SUPREME COURT, U. S.
FEB 28 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-404

LEWIS COLTEN,
Appellant,

v.

COMMONWEALTH OF KENTUCKY,
Appellee.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF KENTUCKY

APPENDIX

Filed September 20, 1971
Probable Jurisdiction Noted January 10, 1972

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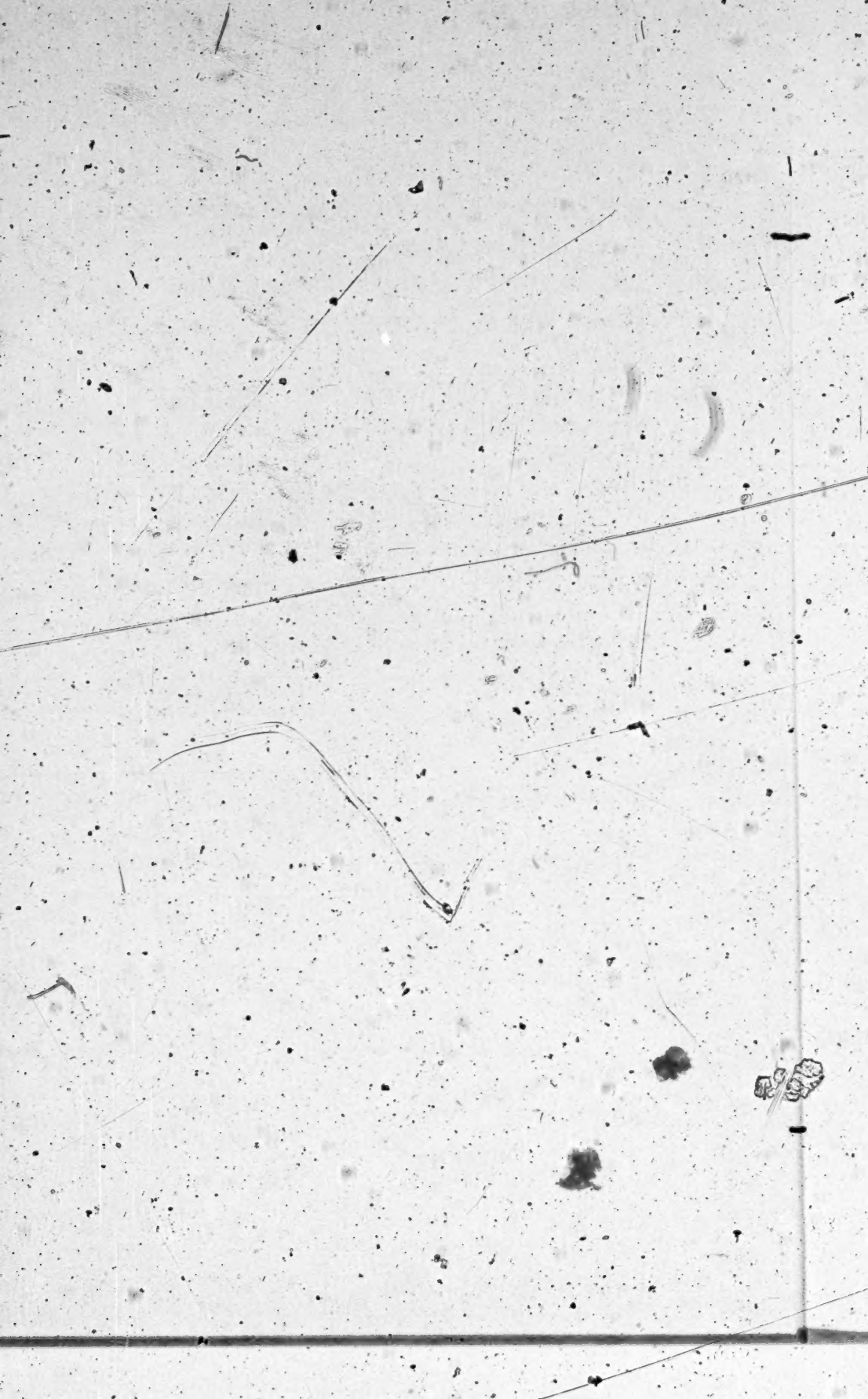
JUDGMENT OF FAYETTE CIRCUIT COURT is not included in this Appendix but is printed in full in the Jurisdictional Statement, pages 12a-15a

JUDGMENT OF THE KENTUCKY COURT OF APPEALS is not included in this Appendix but is printed in full in the Jurisdictional Statement, pages 1a-11a



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No. 71-404

LEWIS COLTEN,

Appellant,

v.

COMMONWEALTH OF KENTUCKY,

Appellee.

CHRONOLOGICAL LIST OF PROCEEDINGS BELOW

March 3, 1970: Complaint and Warrant Issued

March 6, 1970: Trial and Judgment, Fayette Quarterly Court, CECIL DUNN, Trial Commissioner

March 12, 1970: Notice of Appeal from Judgment of Fayette Quarterly Court to Fayette Circuit Court

March 24, 1970: Appeal Perfected

April 24, 1970: Trial and Judgment, Fayette Circuit Court, N. MITCHELL MEADE, Judge

September 8, 1970: Appellant filed Notice of Appeal to Kentucky Court of Appeals

September 10, 1970: Appellant filed 1 volume transcript of record containing certified copy of Judgment and Notice of Appeal

November 9, 1970: Appellant filed Statement of Appeal, $25.00 filing fee, 1 volume transcript record and 2 volumes evidence and Notice and Motion for Appeal

December 16, 1970: Appellant filed briefs and Notice.

March 25, 1971: Appellee filed briefs and notice

March 26, 1971: Submitted

May 21, 1971: Affirmed (Comm. CULLEN)

June 22, 1971: Mandate Issued

June 30, 1971: Appellant filed Notice to Appeal to the Supreme Court

June 30, 1971: Appellant filed Notice and Motion for Stay of Execution and Enforcement of Mandate (exhibits attached) Sustained 7-13-71

COMPLAINT AND WARRANT

COUNTY OF FAYETTE
QUARTERLY COURT

COMMONWEALTH OF KENTUCKY

v.

LOUIS COLTON, Defendant

Affiant and Complainant, Kenneth Harlow; Address, State Police Headquarters, Richmond; Telephone No., _____; says that on the 3rd day of March, 1970, in Fayette County, Kentucky, the above named defendant Louis Colton Unlawfully committed the offense of disorderly conduct.

/s/ Tpr. Kenneth Harlow
Affiant

Sworn to before me in Fayette County, Kentucky, this 3rd day of March, 1970.

/s/ A. Norrie Wake
Judge, Fayette Quarterly Court

TO ALL PEACE OFFICERS IN THE COMMONWEALTH OF KENTUCKY:

You are hereby commanded to arrest Louis Colten and bring said defendant before the Judge of the Fayette Quarterly Court to answer a complaint made by Kenneth Harlow charging said defendant with committing the offense of disorderly conduct. Issued at Lexington, Fayette County, Kentucky, on the 3rd day of March, 1970.

/s/ A. Norrie Wake
Judge, Fayette Quarterly Court

FAYETTE QUARTERLY COURT
Criminal Division
March 13, 1970

ORDER

This case set for trial, same called, the Court being fully advised and ordered the defendant fined ten ($10.00) Dollars and costs.

Cecil Dunn

Trial Commissioner, Fayette Quarterly Court
Criminal Division

Robert F. Stephens

Judge, Fayette County

ATTEST:

Clerk, Fayette Quarterly Court
Criminal Division

App. 4

TRANSCRIPT OF EVIDENCE
AND PROCEEDINGS

(VOLUME I)

April 24, 1970

JOHN R. MILLER
DIRECT EXAMINATION

* * * * *

BY MR. MOLONEY:

[5] Q. You are a State Policeman? A. Yes, sir.

Q. Trooper Miller, were you so employed on March 3, 1970? A. Yes, sir, I was.

Q. On that particular day to what duties had you been assigned by your superiors? A. On this day I was assigned the special detail at the Blue Grass Airport. This was the day the First Lady, Mrs. Nixon, was to visit Lexington, and my special assignment was to patrol the Airport Road from U.S. 60 up to the front of the terminal building to assist the motorcade in leaving the Airport Road onto U.S. 60, to assist the motorcade when they returned, crossing U.S. 60 onto the Airport Road and to prevent any parking on either side of the Airport Road and also on Highway 60 in front of the immediate area and not to allow anyone to walk across from U.S. 60 over to the airport.

Q. Trooper Miller, when you refer to the Airport Road you are referring to that access road which runs between U.S. 60 or the Versailles Road and the airport terminal itself? A. Yes, sir. This is the entrance to the airport.

Q. All right, sir. Did you on that occasion while in the performance of your duties have an opportunity to meet or become involved with the defendant in this case, Lewis Colten? [6] A. Yes, sir.

Q. Would you relate to the Court what occurred leading up to that and what occurred at the time of the involvement? A. Yes, sir. I had been assigned to this most of the day; however, as the motorcade consisting of Mrs. Nixon and party came back to the airport, I was blocking

the traffic coming from Versailles to Lexington and directing the motorcade itself to go ahead and enter the access road. After completing this assignment, the motorcade had already come in, I again got back in my police car to resume the patrol assignment. As I did so, I noticed a red Volkswagen, '63 model, two door, turn into the Airport Road immediately in front of me. This vehicle had expired Kentucky registration plates, 278-016. I stopped the automobile and found the driver to be Norbert Joseph McGuire, Jr., and I issued him a citation for expired registration plates, and I also examined his inspection sticker on the windshield and found that also to be expired, so I gave him two citations—one for expired registration plates and one for expired inspection sticker.

While I was busy writing this ticket, I noticed another car come by and pass me and go on into the parking area. This car bore an expired Louisiana license plate. At that moment I was busy writing the citations for McGuire and I was unable to stop that one. As I [7] finished—the McGuire citations were issued at 1475 hours.

Q. That would be 2:35? A. 2:35, yes, sir. After finishing and returning to normal patrol in this area, some of the crowd began to leave the airport area, and I noticed the same automobile, this is a '63 Valiant convertible, pull out of the parking lot.

Q. This is the one with the Louisiana plates? A. Yes, sir, the ones that I had already noticed were expired. This vehicle pulled out of the parking lot and back onto the road and I stopped this car and found it to be Guy M. Mendez III, and he told me that he was the owner of the vehicle and had not received his license plates from Louisiana, so I issued him a citation for expired registration plates. As I stopped the vehicle and got out of my vehicle, my police car, and walked up to the side of the Mendez car which was parked directly in front of mine—

Q. Trooper Miller, I notice you kind of looking toward this board; if you could step down here and maybe lay out on this diagram— Your Honor, this diagram was prepared

by the defense and the Commonwealth will stipulate it's similar to the situation at the airport– Now, when you stopped the Mendez car, where did you stop it, sir–using this diagram? A. That diagram doesn't really show U.S. 60.

[8] Q. Well, the Versailles Road is 1,300 feet off to the left of that diagram. I don't think you need to show the exact spot, but just use the roadway and the gravel shoulder to indicate where you stopped them on the road itself. A. This is the Mendez car.

Q. Yes, sir? A. I'm not sure of this. That isn't clear, this diagram– There's a heliopath there.

THE COURT: A what?

A. A heliopath, sir. A superior concrete path for helicopters to land on somewhere in this area here. It's approximately across from that.

Q. You indicate, Trooper Miller, that the Mendez car, which is that red car that you have placed on that magnetic board, is on the gravel shoulder of the road? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. All right, sir. A. It was just barely off the gravel portion.

Q. All right, sir. A. Any my police car–let's use the yellow since it's odd color–was directly in back of it, and as I opened my car door and walked up to this car, the defendants pulled into the back of my police car.

[9] Q. Now, let me ask you, sir, are you sure you were out of your car and approaching the car driven by one Guy Mendez when the car driven by the defendant, Lewis Colten, pulled in behind your cruiser? A. Yes, sir. I was here in the roadway talking to Mendez when Mr. Colten got out of his car and walked up the road.

Q. All right, sir. What occurred? A. Well, another car came along and parked here, and at this time we were standing in this area here. The defendant came up and wanted to know why I had stopped this automobile, and I explained to him that the vehicle had expired registration plates and that I intended to give him a citation, and he

insisted on questioning me as to why I was stopping him, and became quite obnoxious. I asked him to go back to his car and clear the area and he did not. He stayed in the area and kept trying to get a conversation going.

Q. Trooper Miller, I ask you, sir, when you use the word, "clear the area," did you ask the defendant, Lewis Colten to leave the area where you were citing Guy Mendez? A. Yes, sir. I didn't know it was Colten at that time. I didn't ask him his name.

Q. An individual who you can now identify as Lewis Colten, the defendant? [10] A. Yes, sir.

Q. When you asked him to leave the area did he do so? A. No, sir, he did not.

Q. What action did you then take? A. I asked Mr. Mendez to come back to my car and have a seat in the right front, and Mr. Colten was interfering with me giving him a citation, so I sat back in my police car on the driver's side and closed the door and rolled up the glass. This left the defendant standing out in the roadway, and I went ahead with the procedure of the citation.

THE COURT: I didn't hear that last part.

Q. Sir, I said that after asking him to leave and he didn't, I asked Mr. Mendez, to whom I was going to issue a citation, to have a seat in my automobile, and then I too sat down in the car and closed the door and rolled up the glass so I could talk to Mr. Mendez without being bothered by Mr. Colten.

THE COURT: All right.

Q. Trooper Miller, at the time you were citing Mr. Mendez, was Mr. Colten alone? A. No, sir. There were other people in the Mendez car. They got out of the one automobile. There were other people in Mr. Colten's car, and there were other [11] people in the unidentified car up front, and these folks came back and there were several of them there. I don't know the number, possibly 12 or 13.

Q. Where were they with respect to the Mendez car? A. They were some of them on this side and—

Q. By "this side" you mean the grass side of the road? A. Yes, some over here and some standing in between my police car and the Mendez car and some in the highway.

Q. Some in the highway? A. Yes, sir.

Q. Do you have an estimate of how many individuals were in the highway? A. Five or six. Maybe seven.

Q. All right, sir. I want to go back to when did you first see the Mendez car pull onto the airport access road going toward U.S. 60. You understand my question? A. Not exactly.

Q. When did you first see the Mendez car getting ready to leave the airport? A. My area of patrol was from U.S. 60 up to the driveway entrance to the airport, and I drove by the parking lot where Mr. Mendez' car had been parked, and I turned around and came back down toward in the direction of U.S. 60. At this time I was only patrolling that short [12] section of the road, and as I came back I noticed Mr. Mendez' car pull back out of the parking lot in this area of the heliopath onto the highway, and the car was immediately in front of me and I recognized it as being the same car I had seen earlier with the expired plates.

Q. When you say it was immediately in front of you, do you recall whether or not there was an automobile between your car and the car driven by Guy Mendez when he first pulled on the access road? A. No, sir, I don't recall. However, the traffic was beginning to be very heavy at this time. Whatever happened at the airport was breaking up and the cars were attempting to get out of the parking lot and back onto the highway and traffic was heavy.

Q. But he was immediately in front of you? A. This particular car was the one I noticed and was trying to stop, and I don't stop him until he is immediately in front of me.

Q. Do you recall whether or not you had your flasher or siren on? A. Not the siren. The blue light, the blue flasher light.

Q. You did have your blue flasher on? A. Yes, sir.

Q. All right, sir. Do you recall, sir, how fast you would have been traveling at the time you pulled [13] the

Mendez car over, shortly before you pulled the Mendez car over?, A. No, but very slowly. The traffic was heavy at this time. It was moving rather slowly. Estimate of 15 miles an hour, maybe.

MR. MOLONEY: I think that's all.

CROSS EXAMINATION

BY MR. GOLDMAN:

Q. Trooper Miller, when you recited your duties for that day you appear to be reading from a paper. Is that paper your own notes? A. No, sir. These are the white court copies of the citations that I gave to Mr. Mendez and Mr. McGuire. These are part of the court files down in quarterly court. This is a citation I issued.

Q. And they recite your duties for the day? A. I didn't know any of these folks and I have the name of Mr. Mendez–

Q. I don't think you understand my question–

THE COURT: I think maybe everybody not talk at one time and make it easier for the court reporter to get it down. Let's have one person talking at a time. His question to you, Trooper Miller, are you reciting from memory as to your activities that day or your duties that day, or are you using the notes that you have in front of you to help you recall that?

A. I tried to explain to him, Your Honor, these are not notes. These are simply court copies of the citations I issued Mr. Mendez and Mr. McGuire. I did not know any of the Mendez, McGuire or the defendant, and I needed these to recall the names.

THE COURT: All right.

Q. Let me try to restate the question. You referred to your assignment as a special detail on that day and then recited to the Court a number of responsibilities that you had, and in the course of making that recitation as to what your duties were you appeared to be reading from something. A. No, I just answered you I was not reading from something.

Q. You were speaking from memory at that time, Trooper? A. Yes, sir. The only notes I have here are the court copies of the tickets I issued to the two gentlemen.

Q. With respect to the orders that were issued to you, Trooper Miller, concerning your duties on March 3rd, how were those orders issued to you? [15] A. They were given to me verbally.

Q. And who gave you those orders, sir? A. We have a regular chain of command. These are passed down through the headquarters, through our captain and whoever might be assigned to the particular detail, and at this particular time it was Capt. Mays.

Q. Did Capt. Mays give you any kind of briefing concerning the possible presence of demonstrators that day?

MR. MOLONEY: Your Honor, I think the best manner to bring this matter out is to ask Capt. Mays whether or not he gave any type of briefing. Capt. Mays will be a witness in this case.

THE COURT: Overruled, although I wonder about the relevancy to this particular incident.

MR. GOLDMAN: I'll withdraw the question and await for Capt. Mays, Your Honor, and perhaps at that time we might have to approach the Bench on the relevancy.

Q. You describe the defendant as becoming obnoxious, Trooper Miller. What did the defendant do that causes you to use that description? A. Well, I had stopped Guy Mendez to issue a [16] citation for no registration plates. This is not an arrest. It's a very simple procedure. I explained this to the defendant, and he evidently just wanted to cause trouble because he didn't leave at that time. Mr. Mendez was not arrested and was not going to be detained except for a few minutes.

Q. Do I understand you then to be saying that he was obnoxious because he did not leave after you told him it was not an arrest? A. He was obnoxious to me, yes, sir.

Q. You say he was obnoxious to you? A. Yes, sir.

Q. Do you mean in your judgment? A. No, sir, not judgment. He was interfering with my duties.

Q. Did you at any time arrest Mr. Colten? A. No, sir.

Q. Where do you normally stand, Trooper Miller, when you write a citation after pulling a car onto a shoulder?

MR. MOLONEY: Your Honor, I think the proper form of the question would be where was he standing in this circumstance.

THE COURT: You're right.

MR. GOLDMAN: Your Honor, [17] this is cross examination. I'm trying to establish whether these circumstances were any way unusual.

THE COURT: You can ask him if he stood in a different location on this occasion than he normally does.

MR. GOLDMAN: All right, Your Honor.

Q. The question is did you stand in any different location on this occasion than you normally do? A. No, not at the beginning. I usually always walk up to the car and identify the driver and obtain his driver's license. As I earlier testified, I did have to go back to my car in order to avoid Mr. Colten.

Q. You stated in your testimony that the traffic was heavy, proceeding about 15 miles an hour. A. I said not more than that.

Q. At approximately not more than 15 miles an hour. A. Yes.

Q. And you also stated, sir, that you at least initially were standing in the road with Mr. Colten. Where was the traffic at this time? Was there any danger to you? A. It was dangerous to everyone in the road, and again I think you misunderstood. I was standing in the road with Mr. Mendez. I had no business with Mr. Colten. He [18] came up on his own.

Q. You are correct. I meant to say Mr. Mendez, Trooper Miller, but you did stand in the road with Mr. Mendez for a brief period of time. A. Yes, sir.

Q. Were you at that time in any fear of being run over by a car? A. I'm always in fear of that.

Q. Did this give you any cause to desire to continue your conversation with Mr. Mendez or your inquiry with

Mr. Mendez off of the road? A. The normal procedure is you walk up to the car and obtain the driver's license, and then I usually go back to my car to get off the road and write the ticket and then again take it back to the driver. As I earlier stated, in this particular case I had to have Mr. Mendez come back to my car with me.

Q. You also stated, Trooper Miller, that there were some other people who arrived, other than Mr. Colten, and that some of them were in the highway. A. Yes, sir.

Q. But you also say that there was heavy vehicular traffic in the highway. A. Yes, sir. What's your question?

Q. Well, I want to know if you stand firm on both of those facts, Trooper Miller. Do you wish to revise either [19] of those statements? A. Would you repeat that, please?

Q. Well, you have made two statements—one to the effect that there were people in the highway, the other to the effect that there was heavy traffic proceeding at no more than 15 miles per hour. I wish to check as to whether you want to revise either of these statements. A. No, sir.

Q. Did you cite any of the persons who were in the highway for any violation? A. No, sir.

Q. Subsequent to rolling up the window of your patrol car after you entered the patrol car, did you have any further conversation with Mr. Colten? A. No, sir.

Q. Did you at any subsequent time get out of your patrol car during the course of this incident? A. After I wrote the citation to Mr. Mendez, I got out of my car, yes, sir.

Q. And where did you proceed, Trooper Miller? When you got out of the car? A. Well, Mr. Mendez, I had finished with writing him a ticket and allowed him to get out of the car, and I got out of the car and attempted to move the traffic on down the road that had jammed up because of the obstruction there.

[20] Q. Did you at this time see Mr. Colten anywhere? A. Mr. Colten was never out of my sight during this period of time.

Q. He was never out of your sight? A. No, sir. At all times he stood there in the highway or directly in front of my police car in the immediate area. He never left the area at all.

Q. He never left the area immediately in front of your police car? A. No, sir, not until he was arrested.

Q. Now, when you say in front of the police car, Trooper Miller, could you please approach the board and show us just where it is you are referring to? A. Yes, sir. This would be my police car here. He originally came out of his car back up to this area here where he was talking to me, trying to find out why I was stopping Mr. Mendez. After I got Mr. Mendez in my car and I'm in my car, the defendant remained in this area here at all times, except on one occasion he did come back between here, but he was in this immediate area in the highway or just in front of my car at all times.

Q. You can resume your seat. Did you observe any change in the traffic pattern during this time, Trooper Miller? A. Yes.

Q. What was the nature of that change, sir? [21] A. After these folks came into the road and blocked it up, additional police cars arrived at the scene, and there was approximately three police cars and they stopped there in order to clear the highway.

Q. Did one of those police cars pull up approximately broadside with yours? A. There was one approximately broadside with the Mendez car, and then there was another car somewhere in behind it, not exactly broadside but just to the rear of it.

Q. Alongside your but somewhat to the rear of your? A. Yes, sir.

Q. And which traffic lane would that have been parked in, sir? A. This was in the lane that was blocked by the people.

Q. The right hand lane? A. Yes, sir.

THE COURT: Is that the right hand lane leading to the airport or U.S. 60?

A. Toward U.S. 60.

THE COURT: All right.

Q. During this time that you were sitting in the patrol car, what were you doing, sir? [22] A. I was writing a ticket for Mr. Mendez for expired registration plates.

Q. And approximately how many questions or pieces of information must you fill in on that citation in order to do that, sir? A. Oh, just estimates, somewhere around 25, approximately 25 or so squares or blanks to fill in.

Q. And some of this information did you have to elicit from Mr. Mendez? A. Yes, sir, as to ownership of the car, his address, his date of birth and etcetera.

Q. Did you have to look at any documents in the course of being able to complete this citation? A. Yes, sir, his driver's license.

Q. What is your best estimate as to the portion of that time you had available to actually see Mr. Colten? A. During all of that time.

Q. You were writing and talking to Mr. Mendez and inspecting documents and at the same time watching Mr. Colten? A. Yes, sir.

MR. GOLDMAN: That's all, Your Honor.

[23] JAMES MAYES
DIRECT EXAMINATION

BY MR. MOLONEY:

Q. State your name, please, sir? A. James Mayes.

Q. By whom are you employed, sir? A. Kentucky State Police.

Q. You want to speak up a little bit? In what capacity? A. I'm a captain police officer, troop commander, stationed in Frankfort.

Q. Capt. Mayes, were you employed by the Kentucky State Police on March 3, 1970? A. Yes, sir.

Q. Were you employed in the capacity of troop commander of Frankfort Post? A. Yes, sir.

Q. Does the capacity involve the command of troops in Fayette County? A. Yes.

Q. Capt. Mayes, did you have any special duties on March 3, 1970? A. Yes, I did.

Q. Would you relate to the Court what they were? A. There was the assignment of police personnel to the security and traffic control in and around the airport.

[24] Q. In what connection, sir? A. In connection with Mrs. Nixon's visit.

Q. Capt. Mayes, did you receive any instructions as to what duties your men were to perform that day? A. Yes.

Q. From whom did you receive it? A. From my commander, field commander, Major Powels, Frankfort, verbal instruction.

Q. Oral instruction? A. Yes.

Q. Captain, did you also in connection with Mrs. Nixon's visit to Lexington receive a briefing from anybody concerning that visit? A. Yes.

Q. From whom did you receive that briefing? A. The security, Secret Service with the White House.

Q. Was this an oral briefing or a written briefing? A. It was an oral briefing.

Q. Do you recall, sir, whether or not— Strike that question. Captain, did part of the briefing involve the possible or the possibiliy of a demonstration at the airport? A. Yes.

Q. Were any specific instructions given to you regarding your duties in the event of such a demonstration? [25] Your best memory? A. I don't— No, sir, I don't remember getting any other than just what we normally have.

Q. In the manner of crowd control? A. Yes.

Q. Do you recall, sir, whether or not you passed on to the officers under you any specific instructions as to what they should do in the event of a demonstration? A. In the event of a demonstration?

Q. Yes, sir. A. There was no formal briefing of this nature. I don't remember of any.

Q. You don't recall passing that on—? A. It was very brief. The discussion about the matter was very brief and casual and to the extent of seeing that the officer was at a

particular time and maintained the peace and order, and that was about the extent of it.

Q. Captain, do you know from your memory what the duties of Trooper John Miller were on March 3rd? A. Yes.

Q. What were they? A. To work the traffic on the Airport Road, to regulate the traffic there and permit no parking on that road, and to see that the traffic moved freely in both directions.

[26] Q. All right, sir. Did you have occasion, sir, to see Trooper John Miller and the defendant, Lewis Colten, that day? A. Yes, I did.

Q. Would you relate to the Court the circumstances surrounding that? A. My first observation of the two people together in the same area was when I pulled out of the drive there at the airport and pulled on to the access road heading toward 60. I saw a group of people, some 15, 16 people, standing in the roadway, alongside three or four parked vehicles, which the vehicles were headed toward 60, and on the right side of the road, and as I approached and got closer to this particular crowd, Mr. Colten was in this crowd in the roadway, and Lt. Moberly was driving the car I was riding in and he stopped just short of getting even with the trooper's car and just back of this group of people who were standing there.

Q. Why did you stop at that particular place, sir? A. Well, the road was blocked there, people in the road, and so to determine what was going on, I got out and walked over to the trooper's car and spoke to Trooper Miller and made an inquiry as to what was going on, and of course, he told me that he had a person there in the car with him.

Q. He was in his cruiser? [27] A. Yes, and he told me that there was some traffic regulation he was checking on and had this particular person in the car, and I asked him about the crowd there. He said, "They've been asked to leave, I don't have them stopped," or something to that effect. I said, "Well, I just wanted to find out," and then I returned back and started talking to the crowd there and telling them to get in their car and to leave.

Q. Did you specifically see Mr. Colten there at that time? A. After this had occurred, going on up to Trooper Miller's car— No, I don't know where he was in the crowd at that particular time. No. Most of the crowd at that time was still out in the roadway.

Q. Yes, sir? A. There was some, well, around our car, and some scattered maybe in back of his car.

Q. You're referring to Trooper Miller's? A. Yes, and I can't place Mr. Colten until something else happened after that, until after he was arrested.

Q. Did you ask the crowd to leave, sir? A. Yes.

Q. Did they do so? A. They didn't at first, no.

Q. Do you ever remember seeing Mr. Colten and [28] asking him to leave? A. Personally and directly, no, I don't no.

Q. Do you know whether or not he was in this crowd? A. He was in the crowd when I pulled up there because I remember seeing him.

Q. Did you ever see him leave that crowd? A. No, I didn't see him leave the crowd.

Q. Do you recall from your memory how many times you asked the individuals there to leave? A. I asked the crowd about four times—four or five times to leave.

Q. Then what action did you take, sir? A. I started walking forward past the trooper's car because there was some individuals on down in front of this area in another car, in that direction, and of course, about this time some other officers got there and they were working in back of me there and I was working in front.

Q. What was your aim by going on down the road? A. To work with this crowd. Actually, there was some four or five people there, and stay with them until they got in their car.

Q. I see. Otherwise, to get the cars on out of there and get the traffic moving? A. Yes. That was the objective, yes.

MR. MOLONEY: That's all.

CROSS EXAMINATION

BY MRS. WILSON:

Q. Capt. Mayes, at the point at which you entered the Airport Road and first saw Trooper Miller and Mr. Colten standing together, how far away from Mr. Colten and Trooper Miller were you? A. Well, you're making a connection here of Trooper Miller and Mr. Colten as being isolated to themselves. I don't remember seeing this myself. I remember seeing Mr. Colten in the group of these people here when I pulled up there and stopped or the car was stopped, and that's the only observation I remember of seeing.

Q. Do I understand you to testify that as you turned out of the Airport access road—? A. That's when I first noticed the crowd, the group of people, yes.

Q. But you didn't specifically at that point see Mr. Colten? A. No. I wouldn't have recognized him from that distance anyway. I couldn't have.

Q. When you pulled up and stopped just slightly to the rear of Trooper Miller's car, I presume you stopped in the roadway? A. Yes, I did.

Q. In the right hand lane? A. Yes.

Q. In such a way that you were obstructing traffic [30] behind you? A. Well, it was the only logical place to stop the vehicle at the time because the road was congested and needed some attention.

Q. Was there a car in front of you? A. No.

Q. Were you the only policeman on the scene other than Trooper Miller? A. On first arrival. Police car?

Q. Yes? Was there—? A. We were the first ones, yes.

Q. There was not another police car in front—? A. I don't remember seeing one.

Q. Was there any other officer in the car with you? A. There was another officer driving the car. I was a passenger.

Q. What was his name? A. Lt. Moberly.

Q. If I understand you correctly then, aside from Trooper Miller you were the first police officer on the scene? A. Yes.

Q. You got out of your car on the driver's side? A. Whose driver's side?

Q. Oh, you weren't driving. I beg your pardon. You got out of the car on the inside of the—? [31] A. I got out of our car that I was riding in on the right side. I was a passenger in the front seat, and walked up to Trooper Miller's car on his side of the car, on the driver's side.

Q. Trooper Miller was sitting in his car at the time? A. He was sitting in his police car.

Q. Was the window in his automobile up or down? A. It was down when I talked to him.

Q. I beg your pardon? A. It was down. The window was down.

Q. The window was down? A. Are you speaking of the window there next to Trooper Miller?

Q. Next to Trooper Miller, on the driver's side. A. Yes, it was down.

Q. The window was open? A. Yes.

Q. You spoke to Trooper Miller and then turned around and began asking the crowd to disperse, is that correct? A. Yes.

Q. From that time on until a later incident you were not able to place Mr. Colten in the crowd? A. That's correct.

Q. You yourself did not speak to Mr. Colten? [32] A. I spoke to the crowd there.

Q. Did you at any time speak directly to Mr. Colten? A. Not to my memory, no.

Q. By the time you began to speak to the crowd had other policemen begun to arrive? A. I don't think so. When I first asked the crowd to leave, get in their cars and leave, it was just a moment, just a moment, the best of my memory, that the other police car pulled in back of our car which was stopped there, and—

Q. Who was driving that second car? A. I don't remember.

Q. Do you remember who was in it? A. I believe it was Trooper Harlowe and another officer, and this all hap-

pened in a matter of short sequence here, that my attention wasn't directed toward the police momentarily from that stage on, I mean what was happening kind of back of me, where I had my back turned, and I remember seeing some four or five officers that arrived there just shortly after myself and Lt. Moberly.

Q. Did you see Trooper Harlowe get out of his car? A. No, I don't remember seeing him get out of his car. No, I don't.

Q. If you didn't speak to Mr. Colten, I presume that you did not place him under arrest? [33] A. I did not place him under arrest, no.

Q. Capt. Mayes, can you approximate for us the length of time between the time that you turned out of the Airport access road onto the road to Route 60 and the time that you stopped? A. Are you asking can I determine the amount of time it took to travel from the distance of turning onto the Airport Road until the time we stopped?

Q. Right? A. Be less than a minute.

Q. Approximately how far is it, Capt. Mayes, can you estimate that? A. 250 to 300 yards.

Q. Approximately how long a period elapsed between the time you pulled up and got out of the automobile during which you spoke to Trooper Miller and then began advising the crowd to disperse? A. A very short time—a minute, less than a minute.

Q. During that period of one minute what had happened to the traffic in back of you? A. Vehicular traffic?

Q. Yes, sir. A. At the time that I was speaking to Trooper Miller? I don't recall actually turning around. Lt. Moberly, his attention was drawn to the traffic and [34] the crowd, and he started working with the traffic then. I started talking with the group then. I don't recall actually how many vehicles were stopped up that a way. I don't really know.

Q. Do you know whether there were in fact any vehicles stopped? A. No. No, I don't.

Q. Did you pass any vehicles as you drove on down from the point—? A. No, it was clear.

Q. —which you turned off to the access road? A. There were no vehicles between the point where I first noticed the crowd until we stopped.

Q. The road was clear up to the point where the crowd was in the road? A. Going in our direction. Now, I don't actually remember meeting anyone at that particular time because it was such a short time.

MRS. WILSON: That's all.

T. H. BROWN
DIRECT EXAMINATION

BY Mr. MOLONEY:

Q. Would you state your name, please, sir? A. T. H. Brown.

[35] Q. By whom are you employed? A. Kentucky State Police.

Q. In what capacity? A. Trooper.

Q. Trooper Brown, on March 3, 1970, were you so employed? A. Yes, sir.

Q. On that day what were your duties? A. Assigned to a detail here in Lexington in regard to Mrs. Nixon being in Lexington.

Q. What specifically were your duties with this detail? A. Just to security around the airport, specific assignments to keep certain people from certain areas and let press in and things like that. Just general duties involving such a detail as this.

Q. You made reference to certain people from certain areas. What does this refer to? A. There was an area roped off at the back of the airport and I was stationed at a specific point to keep people from coming into this area.

Q. Just the general public? A. The general public. There was a place for the general public but they had to enter through a specific point.

Q. I see. Then your duties were at the airport building itself? [36] A. Yes, I was out on the apron out behind the airport.

Q. All right, sir. When you say out behind the airport, you are referring to that part of the airport where planes come in and land? A. Where the passengers load and unload.

Q. All right, sir, did you have occasion on March 3rd to see the defendant, Lewis Colten? A. Yes, sir.

Q. Do you recall when this was? A. Well, the first time I remember of specifically talking to him was at about the time the plane was ready to leave.

Q. Well, I think we can skip what happened at that point. Did you have occasion to see him on the Airport Road? A. Yes, sir.

Q. The access road to the airport? A. Yes, sir.

Q. Was this after the plane left? A. After the plane had left.

Q. Had your duties ended at the airport building itself? A. That's right. I was leaving too.

Q. Were you driving an automobile? A. Yes, sir.

Q. Were you alone? [37] A. No, sir.

Q. Who was with you? A. Trooper Kenneth Harlowe.

Q. Where were you all going, if you recall? A. We were going back to our homes.

Q. And where would that be? A. Harroldsburg and Danville.

Q. You live in Danville? A. Yes, sir.

Q. Now, where did you have occasion to see this defendant at that time? A. He was, the first time I saw him, he was standing beside Trooper John Miller's car.

Q. Was this on the access road, sir? A. Yes, sir.

Q. Do you recall whether or not he was standing on the traveled portion of the road or on the shoulder of the road? A. When I first saw him, he was standing on the traveled portion beside Trooper Miller's car on the driver's side.

Q. All right, sir. Would you relate what happened? A. I was immediately behind Capt. Mayes and Lt. Moberly. Their car was stopped in the road, and I pulled up within six or eight feet and stopped behind their car and got out.

[38] Q. Were they out of their vehicles when you pulled up? A. Yes, sir.

Q. Do you know where they were when you pulled up? A. Capt. Mayes was near Trooper Miller's car, and there was several people gathered around in the road in front of Capt. Mayes' car, ten or 15 people, and there was a discussion going on, so I stopped to get out to see what the discussion was about.

Q. All right, sir, and what took place? A. Shortly after I got out, Trooper Harlowe got out on the right side of the car, we walked up to where this group was gathered, and I heard Capt. Mayes tell the people there to move on, to get back into their cars and move on. Then, of course, after he had made this statement, then it was our duty to assist him to see that the people did carry out these orders, and we in turn told various individuals standing around to move on, to get back in their cars. I didn't know at the time what the reason for the stopping was in the beginning, but I did go ahead with my duty, telling the people to get back in the cars and to move on down the road.

Q. When you say you told them to move on, do you recall the exact words you used? A. Well, when I would walk up to various individuals standing around, I'd say, "Now, this is none [39] of your affair, what's going on here, get back in your car and please move on and clear the road."

Q. Do you recall speaking specifically to any individuals that day? A. Two in particularly.

Q. Was one of those two individuals the defendant, Lewis Colten? A. One of them was.

Q. Did you specifically say to him what you just related to the Court?

THE COURT: When you say "that day," that day was a long day.

MR. MOLONEY: Well, Your Honor, excuse me.

Q. Did you specifically relate to Lewis Colten on the Airport Road after you pulled up there behind Capt. Mayes' car that the business going on was none of his affair and

that he was to get in his car and leave? A. I told him twice.

Q. Twice? A. Twice.

Q. Do you recall where he was when you told him to leave? A. Once he was standing behind the car, and the second time he had come back by Trooper Miller's car and [40] was going in between them.

Q. In between Trooper Miller's car and whose car? A. And Colten's car.

Q. That's the car behind Trooper Miller's? A. The car behind Trooper Miller's.

Q. Was he in the roadway or on the shoulder? A. The first time that I told him to get back in his car, I walked up to him and he started back that way. Then he went, instead of getting in on his side, he went between the cars.

Q. Was this in the roadway, though, is what I'm concerned with. A. Well, he was on the traveled portion—the cars were off on the shoulder—the first time I told him, and the second time I said, "Get in your car," and he went between the cars instead.

MR. MOLONEY: All right, sir. I think that's all.

CROSS EXAMINATION

BY MR. GOLDMAN:

Q. Do I understand, Trooper Brown, that you were driving the vehicle that you and Trooper Harlowe were in? A. Yes, sir.

Q. Is this a private vehicle or is it a state vehicle? A. State police marked car.

[41] Q. When you say "marked," in what way is it marked? A. It has the blue light on the top and the insignias on the doors and so forth. It's not a plain car or anything.

Q. I'm sorry, I didn't hear you. A. It's not a plain car, an unmarked car. It has the blue light on top and the insignias on the doors.

Q. When you first approached the scene where you saw this crowd, approximately how long did it take you to get

to that area from the time you left the parking field area of the airport? A. I'd say approximately a minute, something like that, from the time— We were up near the Bohmer Flying Service, parked not in the parking area, we did not have to wait in line or anything, we just pulled directly from our parking lot out on the access road, and I'd say something like a minute.

Q. Approximately how fast did you travel, if you recall? A. Well, the traffic was fiarly heavy, and the distance that I traveled wouldn't have been more than a city block from the time that I started the car until I was stopped again. Fifteen or 20 miles an hour would have been the maximum speed that I reached.

[42] Q. Did you pass any cars in the process of getting to where Capt. Mayes' car was? A. No. Capt. Mayes pulled out ahead of me, and I just followed in behind.

Q. You were traveling directly behind Capt. Mayes during this period? A. I was the next car behind.

Q. Do you recall whether there was any traffic blocked up behind your vehicle when you stopped? A. The next car behind me, I think was another police car, two other officers.

Q. Am I correct in assuming that you approached the scene of this incident on the right hand side of the road, that is the usual lane? A. In that lane of traffic, yes.

Q. Do you recall whether there was any traffic coming in the other direction? A. Yes, there was.

Q. When you were serving back, doing your duties back at the airport terminal, was Trooper Harlowe serving beside you?

MR. MOLONEY: Your Honor, I don't think this is really material to the arrest on Airport Road, is it?

THE COURT: What was your question again?

[43] MR. GOLDMAN: I am asking, Your Honor, whether Trooper Harlowe served next to Trooper Brown back at the airport.

THE COURT: I'll let you ask it, but I don't know that it is relevant.

MR. GOLDMAN: I assure the Court that we have our reasons.

THE COURT: I said I'll let you ask it.

A. We had different assignments, and as the day progressed we shifted, you know, from the different ranges from the back of the room up close together and things like that, according to what was going on, but we were in the same general area, yes.

Q. At the time you stated that you saw Mr. Colten at the terminal, at that time was Trooper Harlowe serving next to you or near you? A. We were together at that time.

Q. You were together at that time. Did you and Trooper Harlowe have any conversations concerning Mr. Colten—?

MR. MOLONEY: Object, Your Honor.

Q. —from that time until the time that you reached—until the time you pulled up behind Capt. Mayes' [44] car?

MR. MOLONEY: Your Honor, I really don't see the relevancy of that. It's obvious what counsel is trying to infer, but I don't think it is relevant to whether or not this individual was guilty of disorderly conduct that afternoon on the Airport Road.

THE COURT: Overruled.

Q. Do you want me to restate the question, sir, or do you remember? A. I remember the question. We had no conversation from the time we first talked to Mr. Colten at the airport until we arrived behind Capt. Mayes' car, we had no discussion concerning this gentleman.

Q. Did you arrest Mr. Colten? A. No, sir.

Q. And you state when you arrived at the scene of the incident, Capt. Mayes was telling people to move on? A. Yes, sir.

Q. Did he ask them to get back into their vehicles? A. Yes, sir.

Q. Did he instruct anyone to move off the highway? A. There was a couple of cars down 50 to 75 feet [45] from where Trooper Miller's car— I never did go past Trooper Miller's car toward the main road. I stayed in that

area from his car back in the direction from which I had come. There was two or three cars on farther down the road which would be 50 or 60 feet away, and the captain went on down to the front vehicle, trying to get the front to move out so that the rest of them could follow. I assume that's what he was doing down in that area.

Q. Did he tell any individuals who were standing about to move onto the shoulder or move onto the grass area? A. No. There was no instruction given to move into the grass area. It was to "get into your vehicles and leave."

Q. Were your instructions to the crowd confined to the instructions "move into your vehicle and leave?" A. Yes, sir.

Q. You stated earlier that you entered on the course of conduct of instructing people to get into their cars to leave in order to assist Capt. Mayes? A. Yes, sir.

Q. Was that your only cause in instructing people to get into their cars and leave? A. Well, it was obvious that this was creating a problem there with the traffic and that one portion of the road was blocked and that people would have to get into [46] their cars and leave before we could continue on our way.

Q. Would you please approach the board, Trooper Brown, and— Could you approach the board, please, sir? If we were to assume that the yellow vehicle, if you would please assume that the yellow vehicle is the vehicle in which Trooper Miller was seated, do you recall seeing that vehicle? A. Yes.

Q. Would you show us approximately where you were standing when you first left your car? A. The captain's car was parked about at the rear of Trooper Miller, and I was the next car directly behind him. I got out and walked between these two cars and was in this vicinity.

Q. You walked between your car and Capt. Mayes' car? A. Capt. Mayes' car.

Q. And where did you proceed then, sir? A. Up beside Trooper Miller's car and in front of the captain's car.

Q. Where did you first see Mr. Colten? A. He was standing in this vicinity here, moving about in this vicinity.

Q. Between Capt. Mayes' car and Trooper Miller's car? A. In front of the captain's car. I think the [47] captain's car was parked more or less in the rear. He didn't pull up directly beside.

Q. And did you testify that you then told Mr. Colten to leave? A. He, among others, but I specifically remember him, but I told other people to get into the car—anyone that I came in contact with that didn't belong there, I asked them to get in their car and leave.

Q. Did you ask them or order them, sir? A. Well, just telling them, "Get in your car and leave." You can construe that as asking them or telling them but that's the worlds I used, "Get in your car and leave."

Q. And you testified that you told this to Mr. Colten twice? A. Yes, sir.

Q. Where was Mr. Colten the second time that you said that to him? A. The first time I told him, he started back toward his car. I said, "Get in your car and leave." He started back toward his car, but instead of getting—going to the driver's side, he went between the cars, and I spoke to him again and told him to get in the car and leave, but then Trooper Harlowe stepped in between us and he told him to leave.

[48] Q. Trooper Harlowe took charge of the situation at that point? A. He had come up on the right side. Trooper Harlowe was closer to him; and after I told him to leave, I thought that he was going to his car to leave, but instead he went between us.

Q. And did you stay where you were or did you go somewhere after Trooper Harlowe had stepped between you and Mr. Colten? A. I stayed right in this area, but a girl came up to me and was asking questions and I turned and told her to leave.

Q. Were you able to observe Trooper Harlowe and Mr. Colten after the point that Trooper Harlowe stepped between you and Mr. Colten? A. Yes, sir.

Q. For how long could you observe them? A. Well, I observed that they were having some kind of trouble. Mr.

Colten was slinging his arms and Mr. Harlowe had him by the arm.

Q. Trooper Harlowe had him by the arm? A. By the arm or reached and got him by the elbow or some portion of the arm here.

Q. And did you observe anything further? A. Trooper Harlowe's hat was knocked off and I caught it when it hit the ground and handed it back to [49] him. He turned around and reached and got his hat.

Q. You say it was knocked off. Did it fall off or did someone push it off? A. It came off in this struggle. I don't know who knocked it off. I don't know whether Mr. Harlowe knocked it off or Mr. Colten knocked it off.

Q. Do you know whether it just fell off from movement, would that be another possibility, sir? A. Possibly.

Q. You testified that a young lady, I think it was, was asking you questions at this point. To what extent were you addressing yourself to her and to what extent were you observing what was taking place? A. I was trying to do both at the same time. I didn't want her to get involved in this and I was trying to stay between her and what was going on behind.

Q. Which direction were you facing, sir? A. Both ways. I would look at her and then back here. After I handed Trooper Harlowe his hat, I turned around and addressed myself fully to her.

Q. Did you have to walk away from the young lady in order to hand him the hat or were you closer to him? A. I was close enough to pick up the hat.

Q. Did you see Trooper Harlowe and Mr. Colten proceed toward the area of the fence during this period of time? [50] A. They were proceeding away from that area.

Q. What is the furthest distance from the road that you recall observing seeing them at? A. When he first took hold of him, he was about at the right front fender of this car, between the police car and Mr. Colten's car.

Q. So then you say that your testimony is that all of the conduct took place either in front of Mr. Colten's car

or right alongside his right front fender? A. Well, in front. The side of his right front fender would be over here, but they never did get back there. It all happened in this area here.

Q. You testified before, sir, that when you first ordered Mr. Colten to leave, he proceeded to the place of his car. Did you at that time know that that was his vehicle? A. No, I didn't, but there were other people moving in the direction of different cars, getting in their cars, and I'm certain that this was the car— I don't know whether it had been pointed out to me or whether someone had told him to get in that car or what it was.

Q. When you told Mr. Colten to get back to his car the first time, did he say anything to you? A. He said he wanted to see if these people were going to need a ride. He had some conversation with me about there were other people in the car that Trooper Miller had stopped and he wanted to see that these people had a [51] ride back into town. The car that was sitting here was already full with the exception of the driver.

Q. You say the car was full. Do you recall how many people were in that car? A. There were three people in the back and one or two in the front. There were people in the car.

Q. There were people in the car. Are you certain as to the number? A. No, I'm not certain.

Q. Are you certain as to whether it was filled with the exception of the driver? A. There certainly wasn't room in there to haul all of the people that were in the other car.

Q. What—? I hope I'm not repeating myself, but what made you sure that this was Mr. Colten's car?

THE COURT: I think he's answered that question. Move on.

MR. GOLDMAN: Well, the reason I repeat it, Your Honor, is that it seems now that before the officer indicated he had some lack of certainty and now he seems to indicate that he did understand that to be Mr. Colten's car.

THE COURT: Well, I was thinking I remembered his testimony, [52] he assumed— He said people were moving toward cars and Mr. Colten was heading towards this car. He was not sure whether someone told him or pointed it out or whether he just assumed it. I don't think he can answer any more than that, so let's move along.

MR. GOLDMAN: I'll withdraw the question.

Q. When you say that the car was filled, are you sure that you are recalling the car behind Trooper Miller's car or could it have been the car in front of Trooper Miller's car? A. I'm sure it was the car behind it because I wondered since he had brought the question up, if he was going to see that these people got back into town, where he was going to put them.

Q. Did you question Mr. Colten? A. No. Other than just to tell him to get in his car and leave.

Q. Those were your only words to Mr. Colten? A. Yes, sir.

Q. The second time you told Mr. Colten to get in his car did he say anything to you? A. No. He was going away from me then and not [53] to the driver's side of the car. That's when I told him the second time because I thought maybe he didn't hear me or understand what I said.

Q. Did he look toward you that you can recall? A. The first time he did and made the remark that he wanted to help see if there was anything he could do about getting these people back into town, and then whenever he left from where we were talking and he moved on and went in between the cars and away from the driver's side.

Q. He did not look toward you after the second time you directed him to get into his car? A. No. He was going away from me.

Q. And during all of this time, Mr. Colten, Trooper Harlowe, and yourself were standing either on the road or on the gravel portion? A. I never did leave the paved portion. Mr. Colten left to go between the cars and Trooper Harlowe went behind him and took him by the arm and placed him under arrest.

Q. Did you hear Trooper Harlowe place him under arrest? A. I couldn't tell what the conversation was. There was quite a bit of shouting and quite a bit of confusion going on, and as far as hearing his exact words, I don't know what they were, but I did see him reach and [54] hold of him. They were discussing or talking then about his moving or not moving, and I couldn't remember the conversation.

Q. You couldn't make out the conversation? A. Well, I was having conversation with other people too, and the first thing that attracted my attention was the movement of the bodies and the hat coming off.

Q. And at that time Trooper Harlowe had Mr. Colten's arm? A. Yes, sir.

Q. Do you recall at any time either of them standing on the grass area? A. Well, this would put them in this area here at that time when this was going on, when the hat came off.

Q. Did you ever see them on the grassed area? A. Is this a gravel shoulder here?

Q. Well, sir, I want you to recall to the best of your recollection where the gravel was and where the grass was. A. Well, I'm recalling to the best of my recollection where this occurred was right in front of the right front fender of this car. I don't remember specifically whether the ground was covered with grass or whether it was covered with gravel, but that's where it occurred.

Q. After Trooper Harlowe had Mr. Colten by the arm, did you at any time thereafter assist Trooper Harlowe? [55] A. No.

Q. Where did you go? What did you do, sir? A. I was talking to this young lady.

Q. Did you see Trooper Harlowe bring Mr. Colten to the vehicle in which he was taken from the area? A. They were behind me at the time.

Q. Excuse me, sir, could you explain who you mean by "they"? A. Trooper Harlowe and Mr. Colten, after he started— After I handed him the hat, they they went

behind me in this direction toward the center of the road, and I heard a scuffle and heard Mr. Colten screaming and hollering and making some kind of noise.

Q. Do you recall what he screamed? A. It wasn't intelligible, what he was saying. Just more or less hollering.

Q. Did he scream any words, to the best of your recollection? A. No words that I can remember.

Q. Was it a scream of pain to the best of your recollection? A. Possibly.

Q. Were you facing this scene at any time or was it—? A. Not at that time. Whenever Trooper Harlowe started out from between the cars with Mr. Colten, this girl [56] seemed to want to interfere or get involved, and I was standing there talking to her.

Q. Were there any other police officers around that you can recall at this time? A. Trooper Sayre and Trooper Lovett were in the car immediately behind me, and they were all three behind me.

Q. Do you recall any other police officers there at that time? A. Not at that time.

MR. GOLDMAN: That's all, Your Honor.

KENNETH HARLOWE
DIRECT EXAMINATION

BY MR. MOLONEY:

Q. Would you state your name, please, sir? A. Kenneth Harlowe.

Q. By whom are you employed? A. Commonwealth of Kentucky, State Police.

Q. Were you so employed on March 3, 1970? A. Yes, sir.

Q. Trooper Harlowe, let me ask you, what were your duties on March 3, 1970? A. To assist the Secret Service on security at [57] the airport.

Q. Did you have occasion to see the defendant, Lewis Colten at the airport on that day? A. Yes, sir, I did.

Q. How many times did you see him? A. I seen him on three different occasions.

Q. All right, sir. Was one of those occasions on what is referred to as the Airport Road? A. Yes, sir, that's correct.

Q. Would you relate the circumstances of seeing him there? A. After Mrs. Nixon had left, we were winding up the tour of duty over there that day. As we were leaving—

Q. Who were you with? A. I was with Trooper Brown.

Q. Who was driving? A. Trooper Brown was. As we were leaving, the captain, Capt. Mayes, was directly in front of us, going out the Airport Road. There was one cruiser sitting off the side of the road, over toward the edge of the road on the Airport Road. There was a large—well, not a large—12, 15, 18 people out in the road. The first cruiser, which was driven by Capt. Mayes and Lt. Moberly had to stop for this crowd that was out in the road. We stopped directly behind them.

Q. Go ahead. [58] A. After that the captain got out, as did myself and Trooper Brown, and the captain advised the subjects there to get back in their cars and leave, after he talked with the other trooper. I didn't know who the other trooper was at that time. I later found out it was John R. Miller, found out what the circumstances was. He advised them that no part of what was going on between the trooper and the other subject—

Q. When you say he advised "them," is this the crowd? A. Yes, sir, that was the crowd. Yes. He told them to get back in their cars and leave on several occasions which they did no. Some of them got in their cars, some of them left and some of them got in their cars and sat there but caused no trouble, the ones that got back in their vehicles.

Q. Did you see the defendant, Lewis Colten, in this crowd? A. Yes, sir, I did.

Q. Did you specifically see him individually? A. When I seen him he was over at the edge of the road. He was still on the road. He wasn't out in the middle of the road, he was over at the edge of the road when I seen him.

Q. You want to come around to the board here, Trooper? And let me ask you, assuming that the yellow car [59] is Trooper Miller's car, where was Mr. Colten

when you first saw him? A. When I first saw him, when I first seen him, recognized him, where Capt. Mayes' cruiser—this is the traveled portion, Capt. Mayes stopped here on account of the crowd gathered out here, and I'm not sure by which car they were standing. All I know is out here in the road he had to stop, right here, and we came directly up behind him and the other cruiser, and that's when I seen Mr. Colten in the road.

Q. He was out in the road? A. By which car I couldn't say which car, by which car it was by. There was two or three cars along there, I couldn't say which car he was by at the time, but I know he was out in the road right here.

Q. Tell what you remember as relates to your contact with Mr. Colten? A. Well, I had no conversation with him up there. I heard the captain talking to him up here. I had no conversation with him up here at all. The captain advised him along with the other group to leave, get back in their cars and leave. My only conversation was back here along Trooper Miller's cruiser. He had went back to the cruiser again. That's when I asked him to leave.

Q. Did anybody else ask him to leave? A. Yes, sir. He had been asked to leave. I [60] heard the captain ask him, and that's all I heard ask him was the captain.

Q. All right? A. And he came back here and then I asked him to leave because the captain had already made it clear he was to be on his way, and he said he was going to stay around and see what happened. Those were his words.

Q. What action did you take then, sir? A. I then arrested him.

Q. What did you charge him with? A. Disorderly conduct.

Q. On what basis? A. He refused— In my opinion he was blocking traffic out here to start with, creating a disorder is what it amounted to. I charged him with disorderly conduct.

Q. All right, sir. Trooper, when your car pulled up behind the captain's car, from your memory do you know whether or not there was traffic blocked behind you?

A. There was, I would say, three or four minutes later. One reason, we had to stop in the road due to the crowd. In fact, we had one, Lt. Moberly, directing the traffic around the cruisers at that time, yes.

Q. Around the cruisers? A. Right.

Q. So he was using the inbound lane to get traffic [61] out of the airport? A. Right. Yes, sir.

MR. MOLONEY: That's all.

CROSS EXAMINATION

BY MRS. WILSON:

Q. Trooper Harlowe, you said that you saw Capt. Mayes ask Mr. Colten specifically to leave? A. I heard him, yes, ma'am.

Q. You heard him—? A. Yes, ma'am.

Q. —speak to Mr. Colten? A. Well, more or less. The crowd there, the group that was assembled. I didn't hear him say anybody's name in particular. I heard him say to the crowd. He was talking to the crowd.

Q. You heard him address the crowd? A. Yes.

Q. And you placed Mr. Colten in the crowd? A. Mr. Colten was in the crowd, yes.

Q. Then you yourself spoke to Mr. Colten? A. Yes, ma'am. After he left from where the captain had been talking, then he came back towards the cruiser, the cruiser which was occupied by Trooper John Miller, and that's where I asked him to leave, yes, ma'am.

[62] Q. Where were you at that time in relation to the roadway? A. He came— I was off the roadway at that time.

Q. Were you on the grass? A. Yes, ma'am.

Q. You were on the grass? A. Yes.

Q. Was Mr. Colten on the grass? A. Yes, ma'am.

Q. You were both all of the way across the shoulder and on the grass at the time? A. Well, that's considered part of the shoulder. I mean what I'm getting at, I wasn't on the traveled portion of the road. I can't say there's gravel there and then there's grass. I can't say whether

I was on the gravel or the grass. I wasn't on the traveled portion of the road, though.

Q. Were you on the inside of the cars, between the cars and the back end of the fence row? A. Yes. I was between the car and the fence row, yes, ma'am.

Q. Mr. Colten was on the inside? A. Yes.

Q. So the cars were between you and Mr. Colten and the roadway? A. Well, we were at the corner of the car, yes, [63] it could be said they were between us, yes.

Q. Exactly what did you say to Mr. Colten? A. I asked him was he going to leave, and he said, in his words, he was going to stay around and see what happened.

Q. Did you say, "Are you going to leave?" A. I told him to leave.

Q. You said—? A. I told him to leave, yes, and then I asked him, "Are you going to leave?" He said he was going to stay around and see what happened.

Q. You said, "Will you leave?" A. No, ma'am.

Q. Would you tell me—? A. Okay, I'll tell you—

Q. —me exactly what you said? A. I told him to leave, and he stood there, and I said, "Are you going to leave?" He said, "I'm going to stay around and see what happens. I then placed him under arrest.

Q. Did you address Mr. Colten in any particular way? A. I don't remember. All I remember is asking him to leave or telling him to leave and then placing him under—

Q. Did you say, "Are you going to leave, loudmouth?" [64] A. I don't remember.

Q. Is that a form of address which you might have used? A. No, ma'am, I hardly think so.

Q. You don't use the word "loudmouth?" A. Well, no, ma'am, we don't make that a policy to use something like that.

Q. Are you saying that you did not say "loudmouth?" A. I'm saying I don't remember, ma'am.

Q. You don't remember? A. Right.

Q. But you might have said it? A. It's possible, but I'm saying I don't remember. He was very loud.

Q. Did you say anything to Mr. Colten like, "You've caused enough trouble today?" A. I don't remember. Honestly, I don't. I would tell you if I did.

Q. But you do remember telling him to leave? A. Yes, ma'am, I did.

Q. And you do remember asking him if he was going to leave? A. Yes, ma'am. If he had–

Q. But you don't remember whether or not you addressed him as "loudmouth?" A. If he would have left when I told him, I [65] wouldn't have had no reason to ask him was he going to leave. I wouldn't have placed him under arrest–

Q. And you don't remember–

MR. MOLONEY: Your Honor–

THE COURT: Just a minute. Let him finish his answer because she can't get both the question and the answer at the same time.

A. I told him to leave. Of course, he had already been told, and I said, "Are you going to leave?" He said, "I'm going to stay around and see what happens." I then placed him under arrest.

Q. What did you say when you placed him under arrest? A. I told him he was under arrest, he was going to jail.

Q. You do not remember whether you addressed him as "loudmouth?" A. I–

MR. MOLONEY: Your Honor, I think he has answered that question. I realize that the scope of cross examination is broad, but I think we're getting a little too broad on that question.

THE COURT: Well, I don't [66] want to limit her on cross examination, but let's not go over the same points.

Q. Do you remember–let me ask the question again– Do you remember whether you said anything to the effect that, "You've caused enough trouble today?" A. I don't remember it, no, ma'am.

Q. Is it possible you could have? A. It's very possible.

Q. Like this had reflected your feelings at the time?

MR. MOLONEY: Objection to what his feelings were.

THE COURT: Overruled.

Q. Are you going to answer? A. Repeat the question again.

Q. Might this expression, "You've caused enough trouble today," have reflected your feelings at that time? A. It would have been true, yes, if I had said it, because he had indeed caused enough trouble.

Q. To what are you referring, Trooper Harlowe? A. As I stated when I started, I seen him on three occasions.

Q. Would you tell us about the earlier occasions on which you had seen Mr. Colten? A. The first occasion was—

MR. MOLONEY: Judge, [67] Your Honor, I think what we're concerned with is whether or not—

THE COURT: I agree. I think there's no questions about the Trooper's feelings, so we don't have to go into his thoughts at the time. He stated what they were.

MR. GOLDMAN: Your Honor, if we may approach the Bench?

THE COURT: You don't have to approach the Bench.

MRS. WILSON: Well, we'd just as soon pursue this with Trooper Harlowe a little more.

MR. GOLDMAN: Your Honor, we feel we have authorities on—

THE COURT: He says that he was upset with this defendant that day, and if you're going to go into his motive as to why he may have arrested him—I think that's what you're attempting to do—and he said, "If I said it, it was true." I think he's already stated it for you, the answer you want.

MR. GOLDMAN: Your Honor, [68] if we may approach the Bench? We have other reasons for—?

THE COURT: All right.

(Conference at Bench out of hearing of reporter, between Court and counsel.)

MRS. WILSON: Could you read back the question, please?

(The reporter read Question X41 to the witness.)

Q. Would you answer, please? A. The first time I saw him was when he, Mr. Colten, as the airplane was getting ready to leave they come up to me where I was stationed at, at the airport, and said, "We're going to have a party." I said, "Not out here," so they then proceeded to get over on the lawn of the airport and throw themselves a little whooping and hollering party over there or whatever they call it, creating a scene. That was the first time. The second time I seen him was when Capt. Mayes advised him, with the group, to leave, and the third time is when I arrested him.

Q. As a police officer, Trooper Harlowe, I assume that you have encountered demonstrations before?

MR. MOLONEY: Your Honor, I think we're going awfully far afield here. I think we've got to try this case.

THE COURT: Sustained.

[69] Q. Did you at the airport hear Mr. Colten or observe him do anything you found particularly offensive?

MR. MOLONEY: Objection again.

THE COURT: I'll let him answer.

A. Yes. In my— I shouldn't say in my opinion. He was disorderly at the airport, yes, before he was arrested. He most certainly was.

Q. Did you issue a citation at that time? A. No, ma'am. That's on private property. It was left up to the owner of the airport what action he wanted taken. It was when he got on the road down there that we took action.

Q. What did he do or say that was disorderly at the airport? A. There was people all going in and out of the airport. They were all standing around, a group. Not only Mr. Colten, a group, hindering the people going in and out of the airport.

Q. This is what you found disorderly? A. Yes, ma'am, [illegible]ure did.

Q. That there was a group of people standing there? A. Yes.

Q. This is all that you found disorderly? A. Yes, that and their appearance. We—

[70] Q. What about their appearance disturbed you? A. You want me to answer the question?

Q. Yes. A. Okay. When you get out in public, you try to dress decently and when you're around not create a big scene, with an awfully lot of important people traveling in and out of the airport, they can't stand around in front of everybody creating a scene.

Q. Was Mr. Colten nude? A. If he had been, he might have been locked up before. I don't think that—

Q. Was his dress indecent? A. Do I have to answer that question?

THE COURT: Yes.

A. It's about like he's dressed today, ma'am.

Q. You find his dress indecent? A. Well, I don't know whether he had any shoes on that day or not. I don't know what he had on then, but he was creating a scene is what I'm getting at but he wasn't arrested.

Q. People who dress like this offend you? A. I didn't say that.

MR. MOLONEY: Your Honor, I really believe that Mrs. Wilson has proved every point she wants to prove by this line of questioning, and we've [71] got several more witnesses to call, and I think we better move on.

THE COURT: I think so too.

MR. GOLDMAN: We accept the prosecutor's judgment, Your Honor.

Q. Trooper Harlowe, when you ordered Mr. Colten to leave and he responded that he wanted to stay around and see what happened, did he make any other response? Did he say anything else? A. He said he was just going to stay around and see what happened.

Q. Did he say anything else? A. Not that I recall, ma'am.

Q. Did he ask whether he could take some of the people home in the car that was being commandeered? A. He could have. I'm not saying that he did or didn't. I don't know.

Q. He might have said that? A. He might have, but when I told him to leave and he didn't, and also the other request, I think that was enough to make the man leave.

Q. The only response which he made to you that you remember was that he was going to stay around and see what happened? A. Yes.

[72] Q. Were there any other non-police officers in the immediate vicinity at the time that you placed Mr. Colten under arrest?

THE COURT: Now, I don't know what you mean.

A. I don't either.

Q. Any other civilians.

THE COURT: Were there other people around other than policemen, is that what you're asking? All right.

Q. Yes. Seems like there was another young lady standing around somewhere. I don't know, but there was someone else out there, I believe, yes.

Q. Would you describe the young lady? A. She had on a buckskin outfit at that time and barefooted. I don't know what she's got on today.

Q. Was she tall, short? A. Short and heavy set. She's here.

MR. GOLDMAN: Your Honor, I think we have only three more questions.

MR. MOLONEY: Your Honor, are we going to switch off on this?

THE COURT: I think one of you at a time better take this [73] witness.

MR. GOLDMAN: All right, Your Honor.

Q. Were your instructions to Mr. Colten, Trooper Harlowe, directed solely at getting back into his automobile? A. Solely getting him into a car and leave, yes, ma'am.

Q. Did you at any time tell Mr. Colten to take his hand out of his pocket? A. I sure did, yes, ma'am.

Q. When did you do this? A. When I placed him under arrest.

Q. Before or after? A. I walked up to him and I was talking to him there and told him that he was under arrest.

He had his hand in his pocket. I asked him to remove his hand from his pocket.

Q. This was after you had told him to leave, he had said, "I'm going to stay around and see what's going to happen," and you said, "You're under arrest," or words to that effect? A. Yes.

Q. And then you said, "Take your hand from your pocket"? A. I might have said it before then. Yes.

Q. Before? A. I could have when I searched him, though, but I could have said, "Take your hand out of your pocket," before then.

Q. What did you do when he took his hand out of his pocket? A. Took him by the arm and started to the paddy wagon with him.

Q. Did you say anything to him at that time? A. No.

Q. At the time you took him by the arm—? A. No.

Q. —and started toward the paddy wagon? You didn't say anything? A. No.

Q. Did you ask him at that time whether or not he was going to leave? A. No. I didn't say anything.

Q. You didn't ask him to—? A. I wasn't interested then whether or not he was going to leave.

Q. You didn't ask him to leave, whether he was going to leave after you took him into physical custody? A. No.

THE COURT: I think his [75] * * *

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[88] EVIDENCE FOR DEFENDANT

LEWIS COLTON
DIRECT EXAMINATION

BY MRS. WILSON:

Q. Mr. Colten, on the afternoon episode in question, March 3rd, were you at the airport? A. Yes.

Q. What was the occasion of your being at the airport? A. My particular reason for being at the airport was a demonstration, a show of support for a gubernatorial candidate who was running for Governor for the State of Ken-

tucky, who was at the airport at the same time Mrs. Nixon happened to be there.

Q. While you were at the airport— Had you driven to the airport? A. I had driven to the airport earlier that morning, yes, and I was driven back by another car. I had come back in a limousine and had left my car at the airport, and then I went back to the airport for the second time to see our candidate off.

Q. And did you leave the airport in your own car? A. Yes, I did.

Q. Were you driving that car? A. Yes.

[89] Q. Was there anyone else with you in the car? A. I believe there were two other people with me in the car.

Q. Who were they? A. One fellow was named Gary, I'm not sure of his last name—Seale, I think, possibly—and I'm not really familiar with the name of the other person.

Q. Did you return from the airport directly to Lexington after Mrs. Nixon left? A. No. Well, I don't really remember how I got back to Lexington.

Q. Will you tell us in your own words what happened after you turned onto the airport access road from the road into the parking lot? A. I was following a procession of cars. There was a large number of us that were at the airport to see Mrs.— At that point I think there was a large number of us that were leaving at the same time. I was near the end because my car wasn't parked with everyone else's car in the regular airport lot. There was an overflow of cars and they had opened up a new parking lot on the other side of the fence, which required me all of the way across the field to get my car, so I was pretty much near the end of the procession when I finally got out. I was following a green convertible owned by Guy Mendez.

[90] Q. Were you directly behind Mr. Mendez' convertible? A. Yes, I was.

Q. Approximately how great a distance or how many car lengths between you and Mr. Mendez' convertible? A. About two car lengths.

Q. About two car lengths? Continue. A. We were traveling, by the time the procession had gotten out of the access road, we were traveling at, I don't know, were traveling, I think, about 20, 25 miles an hour because we were starting to pick up speed, and I noticed at that time a police car sped past me with the blinking light on and pulled up alongside of Mendez or Guy Mendez' car. That car, I don't know what had happened there, the car had pulled up and then dropped back and then cut right behind Guy Mendez' car, causing me almost to hit the car, hit the cruiser, the police cruiser, because I wasn't aware of what his movements were, he just pulled up alongside the car and slowed down, and as soon as he slowed down, he cut behind Guy's car.

Q. When you say the trooper cut between you and Mr. Mendez? A. Yes, and I wasn't— I didn't— I had not suspected that move to take place, and I slammed the brakes on and tried to avoid getting into a collision. I stopped, and at that time the officer got out of the car and walked [91] up to Guy Mendez' car.

Q. Was Mr. Mendez parked on the road? A. Well, when he—the officer said something to him and he started pulling over, and as he was pulling over, in that same move, that's where the police officer pulled behind, you know, pulled behind Guy's car, which caused me to stop and then I pulled behind, I pulled off the road and behind the police car. At that time there was still some other cars that hadn't caught up in the procession—I believe there was still cars—plus the cars in the front had recognized what was happening, and they pulled over also.

Q. Mr. Colten, would you go to the board and place the cars to the best of your recollection in the positions in which you recall their stopping? A. Well, if this is Guy Mendez' car, his car came down the road and stopped about here, and the police car—

Q. How do you identify the point at which Mr. Mendez' car stopped? A. Well, of course, the people—the people that were in this side of the car, I had walked up alongside the car at one point, and I was pressed up against the fence.

Q. You are saying that the fence was closer to the road at that point? A. Yes, it's only two feet from the shoulder of the road. It's very narrow at that point so there's really [92] not much space there. The police car had pulled in over here, I had pulled in over here, there was some cars behind me and there was some cars in front of me—in front of Guy's car.

Q. Were any of the cars parked on the road? A. No. These cars that stopped? No.

Q. You pulled over and got out of your car and what did you do then? Go back and sit down. A. I saw a police officer get out of the car and go up to Guy Mendez' car. He had gotten up to his car and I was curious as to what was happening to Guy, and I had gotten out of my car and walked towards the police officer and Guy's car, and when I had got there, the police officer was speaking to Guy, and I just stopped and stood behind him. I didn't say a word to him because he was busy talking to Guy Mendez, and it was really none— I wasn't really interested in what he had to say, I was more or less concerned about Guy. I know better than to interfere with a police officer in whatever he was doing so I hadn't said a word to the police officer.

Q. At that point where were you standing, Mr. Colten? A. Behind the police officer.

Q. Behind the police officer on the driver's side of Mr. Mendez' car? A. That's right.

[93] Q. Were there any other people around at that time? A. The only people that were around— I mean the only people that were there were the people that were inside the car.

Q. In Mr. Mendez' car? A. Yes.

Q. How many people were in Mr. Mendez' car? A. He had a full car. There was six including himself.

Q. There were five other people and Mr. Mendez? A. That's right.

Q. Did you speak to Trooper Miller? A. Not once, no.

Q. Did Trooper Miller speak to you? A. I don't believe he said anything to me.

Q. What happened next? A. I was concerned– I had overheard– I had overheard what was happening between the officer and Guy Mendez, and he asked Guy to get out of the car and come back to his cruiser. Well, when he opened up the door, the police officer was in a position where he was in front of the door and when Guy had gotten out, I was then, you know, I was then standing in front of Guy so I was able to question Guy at that point.

Q. What did you say to Mr. Mendez? [94] A. I had asked– I think at that point I asked, "Is there any trouble?" I think at that point that's the only thing I– Well, I asked if there was any trouble, and then I had just recognized a point when both of us– The officer then, when he was standing behind us, told Guy to go to the police wagon, and I started walking with Guy to the back of Guy Mendez' car, and then I asked– I just realized something had happened to me with my out of state tags. My state had given me a six week extension and it was on March 3rd, and I figured it was possible that he had done the same thing, so I had asked Guy Mendez if there was a possibility of his state having granted a six week extension on auto tags. I don't know whether he heard me because at that point he was talking to the police officer. So that's all. That's what happened.

Q. You walked back to the trooper's car with Mr. Mendez? A. Well–

Q. Where was Trooper Miller at that time? A. Trooper Miller was standing behind me.

Q. Behind you and Mr. Mendez? A. Yes, and I had gotten to the back of Guy's car and walked between the police car and Guy Mendez' car, and I walked then up toward the front of Guy's car, and Guy came through there, came through the same place I had walked and got into the police wagon or police car, and I [95] imagine the trooper walked back also. At that point I had asked the people in the car what was going on, and I believe somebody then said there was going to be some kind of problem with the car being taken, and I had said, "Well,"

you know, "I've got an empty car and we could take you," but at that point they didn't know whether they didn't have a ride or not. Nobody was really sure what was happening.

Q. Did you speak to Trooper Miller at any time after Trooper Miller got into his car? A. No. I never spoke to Trooper Miller at all.

Q. Did Trooper Miller speak to you at that time? A. If he did, I was not in a position to hear him because at one point I was in front of him, facing the opposite direction, and possibly I was too far away from him because he was going in one direction and I was going in another. We were going two separate directions, so if he was speaking to me, I certainly didn't hear him.

Q. What happened next after Trooper Miller and Mr. Mendez were both in the car? Where did you go? A. Well, like I said, I walked up to the front of Guy's car. At that point I had noticed that there were people in front who were getting—who were concerned about what was happening, and they were getting out of the cars, and there was a group of people coming up the road, and they were on the grass part and on the shoulder of the road because there was a series of cars in front of [96] Guy's car. They were moving towards—they were moving towards Guy's car. At that point I still was concerned about the six week extension, so I turned around and went back to the police van or the police wagon—police car, excuse me—and I had gotten up to the window of the car, and—

Q. Was the window open or closed? A. No, the window was closed, and the officer was asking Guy Mendez a series of questions, and I had tapped on the window and tried to get Guy's attention again to find out whether the car was being confiscated or what was happening with the people that were in the car, and, you know, if there was anything that I could do because Guy's car was packed and my car was fairly empty. I was the only car that had as few people in it as it did, so just at that point, just when I started to try to get Guy's attention, Officer Harlowe

came in between the police car and Guy's car and started walking towards me and was, you know, very–

Q. What did Officer Harlowe say? A. Well, he said it in sort of a belligerent manner that sort of frightened me, that caused me to back up. He said– At that point there he said, "Okay, loudmouth, get back in your car," and I sort of jumped back because of this, you know, because I wasn't– I hadn't expected that, or I hadn't even seen the officer coming [97] over around the car because I was still trying to talk to Guy. I turned around and I said, "Well, okay, but can I take those people in the car with me?". At that point he came right up to me, and he said, "I'm going to tell you one more time, get out of here," and I said, "Okay, I would like to take these people with me," and then he said "Take your hand out of your pocket." I took my hand out of my pocket, and instantly he pulled some sort of move that I just– I had been backing up. While he was doing this, his chest was up against mine, and he was backing me up towards the fence. I was almost up against the fence when he finally grabbed hold of my arm and twisted it and started taking me towards the police wagon, or the police car, and he walked me in between the police car, and at that time he said again, "Are you getting out of here?"

Q. Was he still holding on to you at that time? A. Yes, he had my arm behind me, behind my back, and he said, "Are you getting out of here?" And I said, "Sure, yes." At that point I wanted to get out. I wanted to leave, you know, and I still was concerned about the people in the car because I didn't want to have those people stranded, and I know that there was no other way for them to get back because every car that was there was packed.

Q. What happened after the third time that he said, "Are you going to leave?" [98] A. I said the same thing, you know, I said on the two previous inquiries. I said, "Sure, I'm going but can I take these people with me?"

Q. What was the response? A. I got hit on the head.

Q. I beg your pardon? A. I got hit on the head.

Q. What happened next? A. I became unconscious and I got hit several other times.

MR. MOLONEY: Objection, Your Honor. If he's unconscious, if he's testified he's unconscious, how does he know he got hit?

A. I was in the process of being unconscious. Well, I was hit and I was becoming dizzy and as I was falling, I felt three other blows or two other blows hit me which caused me to become—

Q. Are you saying that Trooper Harlowe hit you? A. I don't know who hit me. I'm not sure who hit me.

Q. Did Trooper Harlowe at any point advise you that you were under arrest? A. No. Not at all.

Q. The first time that Trooper Harlowe approached you and said, "Loudmouth, are you going to leave," had you [99] been saying anything in a loud tone? A. No, I hadn't. The only time I had spoken to anybody was to Guy Mendez.

Q. Did you see Trooper Harlowe before that time on this day? A. No.

Q. You had not seen Trooper Harlowe? A. Not that I could recall, no.

Q. Not that you recall? Was there any reason that you are aware of why Trooper Harlowe would address you as "loudmouth"? A. Possibly. Possibly because of the day's activities.

Q. But you had no direct contact with Trooper Harlowe that you are aware of? A. No.

Q. Did you make any response to Trooper Harlowe such as, "I think I'll stay around and see what happens"? A. No, I didn't. I really wasn't interested in what was happening. I mean I wasn't really interested as far as the happening, I was just interested in the other people in there and in their getting back to Lexington.

Q. Did anyone other than Trooper Harlowe order you to leave? A. No.

Q. Were you present in a crowd when Capt. Mayes [100] ordered a crowd to leave? A. No.

Q. Did you see Capt. Mayes come upon the scene? A. No.

Q. Did you see any other police officers other than, in direct confrontation other than Trooper Miller and Trooper Harlowe? A. They were the only two officers I ever had any, you know, any contact with or any verbalization at all.

Q. Before the arrest? A. Before the arrest.

Q. Mr. Colten, did you see any "no parking" signs there on the roadway? A. No. Yes, I saw them on the other side of the road.

Q. On the other side? Were there any on the side of the road where you were parked? A. There's nothing to put them on.

Q. Did anyone point out any "no parking" signs? A. No.

Q. Did the police officers tell you that there was no parking? A. No.

Q. Did anyone offer to give you a parking citation? A. No.

[101] Q. Did anyone indicate to you that parking was probhited at that particular place? A. No.

Q. The only conversation which you had with the police officer was, "Are you going to leave?" A. Yes.

MRS. WILSON: That's all.

CROSS EXAMINATION

BY MR. MOLONEY:

Q. Mr. Colten, is it your testimony that from the time you went up to Mr. Mendez' car until the time that Trooper Harlowe arrested you, you just didn't talk to anybody and nobody talked to you, and all of a sudden Trooper Harlowe came up and arrested you? A. I spoke to the people in the car because at that point everything had happened very quickly, and I was the only one to have seen what was actually happening. I don't think the other people who were getting out of their car even realized what had happened, so the only person I had come in contact with was Trooper Miller at that point, yes.

Q. Then this testimony of the troopers—you have sat here and listened to them—remembering specifically that they told you to leave, that just isn't true? A. That's absolutely not true. I did not see Officer Brown. I never even saw Officer Brown until today.

[102] Q. You would remember him if you saw him there, wouldn't you? A. I sure would.

Q. You think he might remember you if he saw you? A. Obviously.

Q. And you said you were out there for some kind of demonstration of some type. What kind was that, now? A. We were out there in support of our gubernatorial candidate.

Q. And who's that? A. Sam Mason.

Q. Sam Mason? Where was Sam going? A. Pardon?

Q. You say Sam was getting ready to leave? A. Yes.

THE COURT: That might be interesting, but I don't think it's relevant or material.

MR. MOLONEY: Well, maybe Sam was going to leave the state, Your Honor, I don't know.

Q. Did I understand you to say there were only two people in your car? A. Yes.

Q. Who were they? [103] A. Gary Seale, and I think his name was James Natlock or something.

Q. You don't remember the name of the person in the car with you? A. The two people that got in my— I had nobody in my car, and as the crowd was leaving I had asked anybody that was in a crowded car to come along with me because I had an empty car, and everybody obviously was situated. There were two people, these two other people must have been in a somewhat crowded car and wanted to come along with me. I didn't question who they were or what their names were. It wasn't until later that I found out what their names were.

Q. You kind of stayed behind to make sure everybody had a ride, is that it? A. Yes, sir.

Q. You were the last car out? A. Well, I thought I was the last car out. There were some other cars that came behind me.

Q. You were just taking care of everybody that was out there that day at the demonstration, making sure that they were all right? A. Making sure that everybody got back to Lexington, yes, sir.

Q. Were you their leader, so to speak? A. Well, what do you mean by "leader"?

[104] Q. Were you their leader? Were you their spokesman? A. You might say so.

Q. I think it's a fairly common term. A. You might say so.

Q. You were in some kind of procession, you call it. Is this a formal procession? A. Yes, sir.

Q. Leaving the airport? A. Yes, sir.

Q. What was the reason for a procession? A. We had no place— There was no reason to stay at the airport, and so we all got the idea at the same time to leave the airport, and so we all left the airport and it just so happened that we were all in a line.

Q. And therefore it became a procession? A. Yes.

Q. It wasn't planned ahead of time or anything, was it? A. No, of course not.

Q. Of course not? Mr. Colten, on direct examination you started to answer a question and you said this, talking about when you were leaving, "Well, you see, there were a large number of us out there to see Mrs.—," and then you stopped and started over again. Were you [105] about to say there was a large number of you out there to see Mrs. Nixon? A. Okay. Yes. All right.

Q. So you went out there to see Mrs. Nixon. This Sam Mason story is just a story. A. No, it's not a story. It's a fact. The purpose of our day, all right, if we're going to go through this—

THE COURT: I don't think it's material why they were there.

MR. MOLONEY: Your Honor, I think it is as material why these individuals, in particular Mr. Colten, were at the airport as is material Officer Harlowe's motives which Mrs. Wilson was permitted to bring out.

THE COURT: All right, but let's try to move the trial along a little faster, will you?

MR. MOLONEY: All right, sir.

Q. Wasn't it a fact that there was a planned demonstration out there to protest Mrs. Nixon coming to Lexington, to protest the Vietnam War through attempting [106] to protest against her? A. We feel that– I feel–

Q. I think you can answer– A. All right. I feel and the people who were a part of the day's proceedings felt that a demonstration against Mrs. Nixon and against the policies that Mrs. Nixon stands for, against the pseudo volunteer program that she tried to force down Lexingtonian's throats, was not of our– We weren't going to have the same sort of demonstration that everybody is accustomed to, and it was not a demonstration. We feel that Mrs. Nixon wasn't worthy of our attempts to demonstrate against her, and so we feel that our demonstration would be more in keeping with the pllicies Mrs. Nixon represents by ignoring her and by ignoring her, we felt that we have a candidate who is running for governor and that we would like very much to show the people of Kentucky that our gubernatorial candidate is more worthwhile as a positive demonstration, rather than a negative demonstration, and so we were there to demonstrate for San Mason and ignoring Mrs. Nixon altogether.

Q. Was this "we" you refer to, is this any type of organized group? A. Yes.

Q. What is the name of that group? [107] A. Citizens for Sam Mason. There was no real– There was no–

Q. Does it also go by the name of Students for a Democratic Society? A. Students for–? There was a coalition of organizations, if that's what you're looking for, coalition representing Young Democrats, representing Students for Democratic Society, representing Student Mobilization Committee, representing just concerned students, representing just concerned students, representing concerned Lexingtonians.

Q. I see, Where are you from, sir? A. Pennsylvania.

Q. Living in Lexington? A. Yes, sir, and I'm applying for residency now.

Q. Now, one question I want to ask you, you say there were a lot of cars—referring to the side of the road here—"There were a lot of cars behind me and a lot of cars in front of me." Are you referring to saying there were several cars in front of Trooper Miller's and Mr. Mendez' cars? A. Yes.

Q. Were there several cars behind there? A. I believe there was maybe one or two cars behind me.

Q. Who were in these cars? A. People who were at the airport.

[108] Q. This procession? A. Entirely of people at the airport, yes.

Q. Of your organization? A. Yes.

Q. What was the reason for them stopping? A. The same reason for my stopping. There was one of us that was being stopped by a police officer and was concerned about that person being stopped. We are all brothers and we care for each other.

THE COURT: You had been acquainted with the fellow Mendez before? A. Yes, sir.

THE COURT: How well do you know Guy Mendez? A. I'm not a very good friend of his. I know him. I knew of him at the time.

Q. Mr. Colten, let me ask you, did I understand your testimony to be yours was the only car that had room in it? A. Yes, sir.

Q. Then these other cars that were stopped couldn't take anybody out of the Mendez car back with them? A. I don't believe.

Q. And they really had no business stopping, did [109] they? A. Concern for one of their own, I would say that they had reason for stopping.

Q. You said that you were able to question Guy Mendez? A. Yes.

Q. But you didn't talk to Trooper Miller? A. No, sir.

Q. Now, you're sure you didn't talk to Trooper Miller? A. No, sir.

Q. Or to Capt. Mayes? A. No, I never.

Q. Nor Trooper Brown? A. I've never seen Trooper Brown.

Q. And they didn't speak to you? A. They said they spoke to me. I did not see them speak to me and I didn't see them.

Q. You indicated a group of people were coming up the road. How many were in this group? A. Well, I really . . . I really can't say because I was . . . I was in between . . . Like I say, I was in between the fence and the car, and there was a group of people coming up between on that grassy area. They were coming up that area. I believe there were other people—I'm not really sure because I had to look over everybody's car, [110] but I believe there were some people on the shoulder of the road on the other side coming also. I really couldn't tell. I would say there were . . . .

Q. Fifteen to 18 people? A. Possibly, sir.

Q. And they were walking down a two foot area of grass along beside the cars? A. No. They were down much further. See, there's a 60 foot portion of the fence that's only two foot wide. After that there's a big field. There's a big grassy field. That's where those people were. They were in that grassy area that I saw down . . . .

Q. They never got in the road? A. I couldn't tell because I was on the . . . . I was on the inside. I didn't really see the people that were on the outside.

Q. Let me ask you, you stated that you did not see Trooper Harlowe throughout the day's activities? A. I may have seen him in a group of other police officers because all of the police officers had been together, so I mean I didn't pick him out as any individual.

Q. But you indicated in response to a question from Mrs. Wilson that he may have for some reason had a reason—he may have had reason to call you "loudmouth" after the day's activities. Did you act in some manner [111] as to give him that cause? A. No. That's probably the same reason why he feels my appearance is offen-

sive, is that possibly anything I might have said was offensive.

Q. But "loudmouth," you didn't talk in a loud or a noisy tone at any time during that day? A. Well, we were giving speeches during the day.

THE COURT: Let me ask you one question. You said at one point in your direct testimony that you were crowded in against this fence. Who crowded you in against this fence? A. Oh, Officer Harlowe, when he came around the car he had burst out or he had made the statement, which startled me, and I backed up, and as I was backing up, I was backing up straight back towards the fence, and he was sort of coming after me, or he was sort of walking along with me, asking me the same question, the second time he asked the question. He had asked it once and I was still backing up and I had said, "Yes," and by the time he said it the second time I was almost near the fence.

THE COURT: I thought you said at one time earlier that there were some other people there in front of Mendez' car [112] also inquiring, and I was thinking that you said the crowd of those people had crowded you also into the fence. A. Oh, no. No, no.

THE COURT: Mr. Colten, I think you testified that you were not in the crowd that was coming up from down in this area, is that right? A. That's right.

Q. You were not at any time in this crowd that Capt. Mayes has testified he told to move on? A. I didn't see that. I didn't see a crowd there. I honestly didn't because I was in the other area, and I was being . . . I was being . . . My attention at that time directed entirely with Officer Harlowe, and I hadn't recognized anything at that point that was going on anywhere, so I don't know . . . the people that may have come up the road from the other side may have gathered there, I'm not really sure. I really don't know.

Q. But you were never with them? A. No, I was never with them.

Q. You were always up there by yourself? A. Well, no, he brought me back.

Q. Not with any of your organization? A. No. No, I wasn't with anybody.

Q. You never joined in with those who were in your organization once this car was stopped? A. No, sir.

Q. But you were their leader, I think you said? A. Well, when you say "leader," that's a rather loose term. That's not really . . . when you say "leader," I'm not . . . I'm not really a leader. There's no . . . When you say "leader," it's not that I'm saying something to people that are obeying it. It's, you know, I'm not a dictator, and I'm not an authoritarian. If you consider making a couple of speeches being a leader, then possibly that may be the term. I didn't—

Q. You don't give orders? A. No, I don't.

Q. You don't hold any office in any organization? A. Yes, I do.

Q. Oh, do you? What? A. I'm Steering Committee member for the Students for Democratic Society.

Q. Steering Committee member? A. That's right.

Q. Did you make a speech out there at the airport? A. Yes, I did.

Q. Then this may have been where Trooper Harlowe may have come up with that term "loudmouth"? A. Possibly. Like I said, anything that I may [114] have said may have been offensive to him because of his definition of my appearance.

MR. MOLONEY: Well, okay. That's all.

REDIRECT EXAMINATION

BY MRS. WILSON:

Q. Mr. Colten, what other groups were at the airport, or of the other groups that were at the airport during the day, were you the leader of them all? A. No. There wasn't any leader for that day.

Q. Was everyone that was there and in that procession of people going back and forth supporting your, I guess you would call it a counter-demonstration to Mrs. Nixon? A. Yes.

Q. Everyone in the group was supporting your counter-demonstration? A. Well, if they supported it . . . I mean there was no outright support of it because people were there for different reasons.

Q. Are you saying some people were there for reasons different with your group presumably and they were among your people but for reasons different than your counter-demonstration? A. Yes, I'm sure there was.

Q. Does the group which you identified as the [115] SDS have a president? A. No. We are made up of a steering committee.

Q. Then there is no head man, head leader of the SDS? A. No.

Q. At the time that Trooper Harlowe approached you, how many civilians were right in the immediate vicinity? How many non-police officers were right there? A. There were . . . I possibly recognized maybe two or three people, possibly. I mean my attention wasn't directed toward them so I really wasn't concerned about the people that possibly had been around there, but I was only, like I said, I was only concerned with what . . . Excuse me . . . with what Trooper Harlowe was saying to me, so I caught maybe two people at the most.

Q. Were any of the people who were moving along the road toward the Mendez and the Miller car coming at your specific instruction?

MR. MOLONEY: Your Honor, I question whether this is proper redirect.

THE COURT: I think he's right.

MRS. WILSON: Your Honor, Mr. Moloney has tried to show or seems to us to be trying to show that [116] Mr. Colten even though he was not in the road or can't be identified as having been in the road with this group of people, who were presumed to be obstructing traffic, was in some way a leader and therefore responsible for their having been there.

THE COURT: Go ahead.

A. I'm sorry, could you repeat the question.

MRS. WILSON: Can you read that question back?

(Reporter read Question RD8: "Were any of the people who were moving along the road toward the Mendez and the Miller car coming at your specific instruction?")

A. No, not really.

MRS. WILSON: That's all.

MR. MOLONEY: No questions.

THE COURT: Who was giving guidance to the group that day? You said there was concerted activity.

A. As far as guidance, I guess about four or five were doing, who had mapped instruction on the program out for the day.

[117] THE COURT: All right.

EARL CRAIG WINKLE
DIRECT EXAMINATION

BY MR. GOLDMAN:

Q. Mr. Winkle, were you at Blue Grass Field on the afternoon of March 3rd?

REPORTER: Could I have his name for the record?

Q. I'm sorry. Would you state your name, please? A. Earl Craig Winkle.

Q. And your address, please, sir? A. 245 Rodes Avenue,

Q. On March 3 on the afternoon were you at Blue Grass Field? A. Yes.

Q. Were you there together with other people or did you go there by yourself? A. I went with some other people in my car.

Q. In your car? A. Yes.

Q. At whose request did you go there? A. Well, I went there just, you know, for my own benefit.

Q. What caused you to go there? [118] A. Curiosity mostly. I wanted to, you know, see Mrs. Nixon.

Q. Did you prior to March 3rd know the defendant, Lew Colten? A. No. I met him the day of the trial. I don't know what day that was.

Q. Did you see Mr. Colten out at Blue Grass Field? A. Yes.

Q. But you had never personally met Mr. Colten up until the time of the trial in the court below? A. That's right, I didn't know him until then.

Q. About what time did you begin to leave the airport? A. Oh, 20 minutes maybe after Mrs. Nixon's plane left.

Q. About what time of day was it? Do you have any recollection? A. No.

Q. Were you still in your own vehicle? A. Yes.

Q. Did you have any passengers? A. Yes.

Q. Do you know who they are—who they were? A. There's one that I don't know, but Sally Phlipps was one and Melanie Barrow was the second.

[119] Q. Did you know any of these people prior to that day? A. Yes.

Q. Did you know all of them except that one prior to that day? A. I didn't know Sally.

Q. When you were leaving the airport did you observe anything unusual? A. No, I don't think so. You mean—

Q. Did you observe any cars on the side of the road? A. Well, when Guy Mendez' car was pulled off the road, Lew pulled up behind the trooper's car, then I pulled up behind that.

Q. Did you at that time know Mr. Mendez? A. Not personally. I would know him to see him.

Q. Had you by that time identified Mr. Colten as an individual who had been amongst the group at the terminal? A. When he got out of his car, I saw him, but not until he got out of his car.

Q. Would you step to the board, please, sir, and show—Let us assume that the yellow vehicle— Let me first ask was there a police vehicle on the side of the road? A. Yes.

[120] Q. Was it directly behind Mr. Mendez' vehicle? A. Yes.

Q. Would you show where your vehicle—what you did with your vehicle as you arrived? A. Well, assuming this would be Guy—

Q. Excuse me, would you step on the other side so His Honor can see the board. A. If this is representing Guy's car—

Q. Let's assume the yellow car is the police car. A. Okay. Then this would be the Colten car and mine was right here.

Q. You pulled in behind the vehicle that Mr. Colten was in? A. Yes.

Q. What did you then do? A. I got out of my car.

Q. On which side did you get out? A. Driver's side.

Q. And then where did you go? A. I got out and then came around the side of the car and went between the cars and stood up on the grass.

Q. You went in front of your vehicle? A. Yes.

Q. And proceeded to the grass? Did you at any time stand around in the road? A. No, just long enough to get out of the car.

[121] Q. After you got to the grass did you at any time after that go back to the road? A. No, not until I left.

Q. You mean by that not until you returned to your driver's seat? A. Yes.

Q. Did you observe any "no parking" signs on that side of the road? A. I didn't see any.

Q. What did you observe happen from the position you were in on what you described as the grass? A. Well, when I got out of my car—

Q. Excuse me, you can return to your seat. A. When I got out of my car, I walked between the other cars and I was curious to know what was going on, and I noticed Lew asked somebody, you know, what was going on, you know, and someone said it was expired license tag of Guy's.

Q. Where was Mr. Colten at this time? A. He was right behind Guy's car.

Q. He was right behind Mr. Mendez' car? A. Yes.

Q. Which would place him in front of the police vehicle? A. Yes.

Q. Was he on the road or on the shoulder or on [122] the grass? A. He was in the gravel between the cars. Off the road, I think.

Q. Between the cars? A. Yes.

Q. Directly in back of Mr. Mendez' car, directly in front of the police car? A. Yes.

Q. Did you see to whom he addressed his questions? A. No, I didn't notice.

Q. Approximately how far away were you standing from him at that time? A. Well, maybe 20 feet.

Q. You heard him ask a question? A. Yes.

Q. And you've testified as to the response? A. No, I don't know what was said, and then he went around and asked Guy. Guy was sitting—

Q. When you say he went around and asked Guy, where did he proceed to? A. He walked around to the passenger side of the police car.

Q. Do you recall whether the window was open or closed next to Mr. Mendez? A. I can't remember whether it was open at that time. I looked back later and it was closed, but I can't [123] remember whether or not it was open at the time.

Q. Did you see Mr. Colten have any conversation with Mr. Mendez? A. Lew asked him something and Guy just looked his way and then looked back again, and I don't think he said anything. I think it looked like the trooper was asking Guy something.

Q. At this time did you notice whether there were any people standing in the road? A. Not that I know of. There were several people out of their cars.

Q. Where did you observe people standing? A. Well, once I got out of my car and went between the cars, I walked on up on the bank in the grass and Sally Phlipps was with me—well, not personally with me, but she was right next to me, and I don't recall any other people, although I know there was someone else out of the car.

Q. Did you see any policemen standing around? A. Yes.

Q. Where? A. On the road side of the car, coming from further up back in the line.

Q. Did you hear any order given for people to get back in their cars or to leave? [124] A. An order was given to Lew. One trooper came up to him, and at this time he wasn't talking to Guy, he was standing maybe four feet in front of me.

Q. Did you hear any orders given prior to hearing that order given to Mr. Colten? A. No.

Q. Would you tell in your own words what you saw happen when the officer approached Mr. Colten? A. Well, he came at him sort of fast and pointed at him and said, "All right, loudmouth, get in your car," and Lew said, "Okay, but can we give these people a ride?" And I believe he was referring to the people that were in Guy's car because we had heard that Guy wasn't going to be able to drive the car—

MR. MOLONEY: Objection to all of this what he heard and what he believes.

THE COURT: Objection sustained. Just tell what you know and not what you guess happened.

A. Well; I know it was for those people to get a ride.

Q. You know that he— What did he state to the officer? A. He said, "Okay, but can we give these people a ride?" And the officer said, "I said get in your car [125] and leave," and then as he said that, he walked up against Lew and chest to chest with Lew and started walking backwards, and Lew said, "Well, can we give these people a ride?" And the officer said, "Take your hand out of your pocket," and Lew took his hand out of his pocket, and at that time the officer twisted it behind his back and started walking him toward, back toward the road.

Q. Did you hear the officer say anything further to Mr. Colten? A. No.

Q. Did you hear him ask him again whether he was going to leave? A. As he was walking toward the road, he said, "Now, are you going to leave?" And he said it twice, I think, and Lew said, "Yes, yes."

Q. And then what happened? A. Well, he walked him back down to the gravel between— Well, at that time a paddy wagon had pulled up on the road, and he was walking Lew back between the cars and got him into the gravel between the two cars, and at that time another officer jumped out of the paddy wagon and said, "We can take him," and walked toward Lew's front and grabbed hom of

him, and at that time two other officers besides the one that had hold of Lew's arm came from behind him, and one grabbed him by the hair and hit him twice in the head.

[126] MR. MOLONEY: Your Honor, I think that the testimony of the witness possibly pertains to an action in another court, and that there has been no identification of any officer involved here. I don't think it's any question it's any of the officers here, and I don't think it's pertinent.

THE COURT: Overruled.

Q. Did you at any time hear the officer who approached Mr. Colten, who you say addressed Mr. Colten as "loud-mouth" state to Mr. Colten, "You are under arrest"? A. No.

Q. Or words to that effect? A. No.

Q. Did you hear the officer make any reference to Mr. Colten's prior conduct during the day? A. No.

Q. Was Mr. Colten speaking in a loud voice? A. At what time?

Q. Well, at any time, any time from the time you arrived at the scene? A. No.

Q. How far were you from Mr. Colten during—starting with the time that the officer who grabbed him by the arm approached him, would you explain to us—what [127] your location was with respect to them during that period of time, from the time he grabbed Mr. Colten to the time he brought him in front of the police vehicle? A. Well, like I said, I was about four feet, five feet, behind him on the bank of the hill, and as the officer came toward Lew, he backed him up and he backed him up past me, and I guess I was still about five feet from him as he backed him up, you know, to the back of the hill.

Q. And then as they proceeded to the cars? A. Well, he passed me again as he went down to the cars and I—

Q. How far were you from the cars when they began to pass in front of the patrol car? A. Twelve feet, maybe.

Q. I believe earlier you stated—maybe I didn't hear you correctly—you stated something to the effect that you were, when you first got out, that you were 20 feet from where

Mr. Colten was. Is that correct? A. I believe so. That was when he was behind Guy's car and I was in the grass.

Q. Did you move closer to Mr. Colten or did he move closer to you during—? A. He walked back toward the vicinity where I was, and that's where the officer came up to him.

MR. GOLDMAN: Your [128] witness.

CROSS EXAMINATION

BY MR. MOLONEY:

Q. Mr. Winkle, was it your testimony that you were some 20 feet from Lew Colten when you heard him ask somebody what happened to Guy? A. Right.

Q. Did you hear the response? A. No.

Q. You heard him but you didn't hear the response? A. Yes.

Q. You don't know for any reason why Officer Harlowe may be calling him "loudmouth," though? A. No, I don't.

Q. But you heard him some 20 feet away? A. I'm sorry. May I retract that?

Q. You sure can. A. Well, earlier in the day Lew gave a talk at the airport, but that's my opinion again.

Q. Mr. Winkle, did Mr. Colten get an answer to his question as to what happened to Guy? Or do you know? A. I don't know if he did or not.

Q. Did I understand you to say you went to the airport to see Mrs. Nixon? A. Yes.

Q. Now, when you were leaving the airport, why [129] was it that you pulled over to the side of the road here? A. Curiosity again.

Q. Curiosity? A. We were all sort of in a group.

Q. You didn't know Guy Mendez? A. Not personally.

Q. Didn't know Lew Colten? A. No.

Q. Did any of the individuals in your car know Guy Mendez or Lew Colten? A. Yes.

Q. Did you hear the officers at the scene tell anybody to leave? A. When they came up to Lew.

Q. You didn't hear any other officer tell anybody to leave? A. No.

Q. Did you ever see a group of individuals in the roadway? A. No.

Q. Were there a group of cars in front of Trooper Miller's and Guy Mendez' cars? A. I don't believe so. Guy's was the first car.

Q. No cars in front of him on the road there? A. Not that I recall.

Q. Not that you recall? And to the best of [130] your memory the only person who was told to leave was Mr. Colten? A. Well, after he was told to leave, I heard another trooper when he came down toward . . . from further up in the road, saying, "Everybody get in your car."

Q. This was after? A. Yes.

Q. According to your memory? A. Yes.

MR. MOLONEY: I think that's all.

THE COURT: How many officers did you say grabbed Mr. Colten? A. Four.

THE COURT: Four at one time? A. One officer led him by the arm to the roadway and then just as the one other county policeman came out and grabbed him by the front, two others grabbed him from the back, so there was four at one time.

THE COURT: And who did you say hit him? A. One of the two that came up from behind him hit him. [131]

THE COURT: State policeman, county policeman? A. State.

THE COURT: State policeman? A. Yes.

THE COURT: And how did they hit him? A. With his fist.

THE COURT: Did it render him unconscious? A. Well, when he hit him, he fell to the ground, I guess they must have let go of him, and he was hollering, but he wasn't unconscious.

THE COURT: All right. Step down.

THE COURT: Let the case be continued until Monday at 9 o'clock.

(Court adjourned at 4:45 P.M.)

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Court met pursuant to the foregoing adjournment on Monday, the 27th day of April, 1970, at 9 o'clock A.M., with the defendant being present in open court and represented by his counsel, and the trial of this action proceeded.

Evidence for the Defendant, continued:

SALLIE PHLIPPS, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GOLDMAN:

Q. Will you please state your name for the record? A. Sallie Phlipps.

Q. Where do you reside? A. 272 East Maxwell Street.

Q. On March 3rd were you at the Blue Grass Field in the afternoon? A. Yes, I was.

Q. About what time to the best of your recollection did you begin to depart from the airport? A. 3, to 3:30.

Q. By what means did you leave the airport? A. I left in a car with some friends.

Q. And who was driving your vehicle? A. Craig Winkle.

[133] Q. Did you know Craig Winkle prior to this time? A. No.

Q. Then what caused you to get into Mr. Winkle's car? A. Oh, he asked if I needed a ride back to the Student Center, and I said, "Yes, thank you very much." I had seen him like in the Grill and things like that.

Q. On the way out of the airport did you observe anything unusual? A. Just one of our friends, namely Guy Mendez, was being pulled over by a State Trooper.

Q. All right, when you observed this, what happened? A. We also pulled over to see if we could be of any assistance.

Q. And would you please go to the board? Let us assume that the yellow vehicle is a police vehicle. Did you see a police vehicle on the side of the road? A. Yes.

Q. Would you show the Court which vehicle would have been Mr. Mendez' vehicle? A. This is Mr. Mendez' car.

Q. The one in back? A. Then this would be . . . Then this would be . . . Oh, this would be Guy's car, Mr. Mendex' car.

Q. The Versailles Road would be to your left. [134] A. Yes. Okay.

Q. Where did the car that you were in pull into? A. Oh, I guess right here.

Q. Behind the vehicle behind the patrol car? A. That's right.

Q. You can be seated again, Miss Phlipps. Did you notice who was in that car immediately in front of your car—the car between the car you were in and the patrol car? A. Yes, it was Mr. Colten's car.

Q. Did you notice whether there was anyone else in that car? A. I didn't see anyone else, no. I thought he was alone.

Q. Did you remain in your vehicle? A. No. I got out.

Q. Which side did you get out from? A. I got out on the right hand side.

Q. The passenger side of the vehicle? A. Yes, the passenger side.

Q. And where did you go from there? A. I proceeded up to Mr. Mendez' car. I assumed that he was being stopped for having expired license plates as a couple of our friends had earlier also—their cars had been taken away for the same reason, and they had quite a few people in their car, and we thought maybe they might [135] need—Craig and I—

Q. You say you went to Mr. Mendez' car? A. Yes.

Q. How did you proceed to his car—along the road, along the grass, along the shoulder? A. No, along the grass between the fence and the cars.

Q. Did you see any other people standing about at this time? A. Just myself and Craig and—

Q. Craig? A. Craig Winkle and Mr. Colten had gotten out of his car also.

Q. You saw no one else standing about? A. Not at the time, no.

Q. Did you see any police officers standing about? A. I don't exactly remember when they arrived, but, yes, later on they were standing about.

Q. Where was Mr. Mendez at this time? A. He was seated in his car, talking to a patrolman.

Q. What happened after you got to the car, after you got to Mr. Mendez' car? A. Mr. Mendez got out of his car and went to the patrol car with the patrolman, and I was talking to Mr. Winkle and Mr. Colten.

[136] Q. Where was Mr. Colten standing at this time? A. At the right hand corner of the police car—by the headlight, that is, I should say.

Q. The front? A. The front fender, yes.

Q. Right front? A. Yes, with myself and Mr. Winkle.

Q. Was he standing on the road? A. No. No.

Q. Did you at any time see him standing on the road? A. No.

Q. Did you remain there for the rest of the time until you got back into the vehicle you were in? A. Did I remain there? Yes. Yes.

Q. Did you see anything else happen? A. I saw Mr. Colten apprehended by one of the patrolman that kind of leaped in between the cars.

Q. You previously stated that later on other patrolmen arrived. A. Yes.

Q. Approximately when did they arrive in relation to the time at which Mr. Colten was apprehended as you have stated? A. I would say a minute before or two minutes before. I really have no conception of time. I wouldn't [137] say very long at all.

Q. Approximately how many patrolmen did you see? A. State Police or county—all together?

Q. All together? A. Seven or eight, nine maybe.

Q. Where were their vehicles parked? A. In the road.

Q. At this point in time, when the policemen arrived, did you see any non-policemen, any civilians, standing around other than Mr. Colten, Mr. Winkle and yourself? A. No, No, I didn't see any.

Q. Did Mr. Colten discuss with you the events that were taking place? A. We were both kind of rattling on, but neither one of us were listening to the other very much because we were just watching what was happening.

Q. What, if anything, do you recall Mr. Colten saying? A. I remember him telling me that he wanted to help some people get rides, just like Mr. Winkle and I did.

Q. Did you see any signs anywhere in this vicinity stating that parking was prohibited? A. No. No.

Q. Did you at any time hear any police officer give an order to leave the area? [138] A. No, not until later on. Not until—

Q. You did at some point in time hear a police officer give an order to leave the area? A. Yes. After Mr. Colten was apprehended.

Q. After he was apprehended? A. Yes, after he was apprehended. That's when I heard it, yes. Do you mean a general order? A general order?

Q. I'm asking you if you heard any policeman give any kind of order to leave? A. No.

Q. Did you observe during this time that you were there the nature of the traffic on the road? A. There was no traffic.

Q. You observed that there was no traffic? A. There was no traffic at all. We were the last cars to leave the airport.

Q. You stated before that the policeman, I think you said sort of lept over the car Would you describe what you saw? A. Yes. Mr. Colten and Mr. Winkle and I were standing and just kind of observing, and seemingly to me out of nowhere this man came across the hood of the car and just, you know, kind of like leaped over and said, "And, you, loudmouth, I've had enough of you for today." I just kind of stood there, in awe.

Q. To whom was he addressing this? [139] A. Mr. Colten.

Q. Did he continue to address himself to Mr. Colten? A. Yes. Yes, he told Mr. Colten that . . . that he had had

enough of him for today and to get his hands out of his pocket, and when Mr. Colten took his hand out of his pocket this particular patrolman grabbed it and like put it behind his back and I guess an armhold or something, whatever you call them and proceeded to kind of—And at the same time Mr. Colten was like backing up, you know, and the patrolman said, "Well, are you going to leave now?" And, of course, by this time Mr. Colten was like back against the fence and couldn't leave if he wanted to.

Q. Are you stating that while the patrolman was holding Mr. Colten by the arm he asked if Mr. Colten would leave? A. Yes. Exactly.

Q. Did the patrolman say anything else to Mr. Colten, if you can recall? A. Not that I can recall, except that when he said, "Are you going to leave now," Mr. Colten replied, "I want to leave but I want to help these people," and I believe, if I'm not mistaken, I believe the patrolman said something to the extent of, "Don't be concerned with these people, they're not your concern."

Q. Do you recall whether the patrolman at any [140] time made any reference to Mr. Colten's activities prior in the day? A. No, only when he said he had had enough of him that day.

Q. I'm sorry, what was—? A. Only when he had stated earlier that he had had enough of him for today, so I presumed . . .

MR. MOLONEY: Objection to what she assumed.

THE COURT: Overruled.

MR. GOLDMAN: Did your objection go to "presume?"

MR. MOLONEY: What she assumed.

Q. Would you restate what you heard the patrolman say?

THE COURT: I think I've heard that.

MR. GOLDMAN: All right, Your Honor, we will continue.

Q. The patrolman had Mr. Colten by the arm and then what happened? A. As I said, he backed him against the fence and then their conversation took place, and then he

kind of pushed Mr. Colten toward the road and then onto the road, where several policemen, like one county policeman that I [141] remember specifically—I don't remember his name—said, "Bring him over here, we'll be glad to have him," and then they just kind of had a free-for-all.

Q. They had a free-for-all? Would you describe what you saw? A. I saw one particular policeman hit Mr. Colten on the head and I saw another one do something to his face, although I don't know what. I mean like I didn't see a blow being struck or anything, but I saw his hand go toward his face and then I saw Mr. Colten fall, and that was all I saw.

Q. Did you hear any remarks or sounds coming from Mr. Colten? A. Yes, he was yelling. I would have yelled too.

Q. You say he was yelling, Was he yelling words? A. Yes. He said, "Oh, my head; oh, my head."

Q. Did he make any other sound? A. Moaning, I suppose. No, I don't remember that.

Q. Did you hear any sounds that you would describe as sounds of anger or sounds of pain, or how would you describe them? A. Just pain. Just pain. I knew he obviously had hurt his head. Obviously, it looked like.

Q. Where were you standing during this time? A. Still up by the fender of the car.

Q. Did you at any time hear the officer who grabbed Mr. Colten by the arm say to Mr. Colten, "You are [142] under arrest," or words to that effect? A. Never. Absolutely not.

Q. Did you at any time hear any other officer tell Mr. Colten that he was under arrest or words to that effect? A. No, never.

Q. When Mr. Colten and the police officer were talking to each other before Mr. Colten was brought to this other group of officers, would you describe the tone of voice and gestures used by Mr. Colten? A. He used no gestures because he couldn't, but his tone of voice, he was certainly soft spoken—in fact, to the point that I knew that he was

trying to be extremely nice, not to get angry or whatever—he was very nice and said, "Yes, I would like to leave but I'd like to help these people."

Q. Could you describe the tone of voice and manner of the police officer who grabbed him by the arm? A. Very hostile.

Q. Could you describe more specifically what causes you to—? A: "Are you going to leave now, loudmouth!"

Q. That was the tone of voice he used? A. Yes. Yes.

MR. GOLDMAN: That's all, Your Honor.

[143] CROSS EXAMINATION

BY MR. MOLONEY:

Q. Miss Phillips, how many other people were in Mr. Winkle's car with you? A. There were four of us all together.

Q. What kind of car does he drive? A. It's a Volkswagen.

Q. It was crowded? A. No, not crowded. We could have taken one person in the back seat.

Q. And you stated that you stopped when you saw Mr. Mendez being pulled over to see if you could render any assistance, is that it? A. Yes.

Q. What kind of assistance were you going to render? A. We were going to take a person out of his car with us.

Q. I see. You say nobody was in Mr. Colten's car with him? A. I didn't see anybody.

Q. You never saw Mr. Colten stand on the road, though, while you were out there? A. No, I did not.

Q. Was he in your sight the entire time you were there? A. Yes.

[144] Q. Did you see anybody stand on the road? A. None but the policemen and later on . . . .

Q. Later on what? A. Later on after Mr. Colten was apprehended and beaten so, if you want to put it that way, I saw a girl get out of somebody's car, I don't know what or whose, but anyway, she got out of somebody's car to go help Mr. Colten.

Q. Did you see anybody else out of the cars out there at that time? A. No.

Q. Did you see any other cars other than the four cars lined up there which you have identified as Mr. Mendez', the State Police car, Mr. Colten's car and Mr. Winkle's car? A. There was a car ahead of Guy Mendez' car.

Q. Just one car? A. That I remember, yes. Kathy Plant's car.

Q. No more than one? A. I don't think so.

Q. Could there have been cars further down the road? A. There could have been.

Q. You stated that the police were parked in the middle of the road, is that correct? A. That's correct.

[145] Q. Why were they parked in the middle of the road?

MR. GOLDMAN: Your Honor, I object.

THE COURT: If she knows, she may answer.

A. I guess they wanted to be near the scene, so to speak.

Q. Was there anything preventing them from pulling over to the shoulder of the road? A. Yes. We were on the shoulder of the road.

Q. You were on the shoulder of the road, so they couldn't pull over onto the shoulder of the road because you all were on the shoulder? A. Seems like that might be it, I guess.

Q. Did I understand you to say there was no traffic whatsoever at this scene? A. Not at all.

Q. You were the last people to leave the airport? A. That's correct.

Q. What had you gont out to the airport for? A. We wanted to say good-bye to Mrs. Nixon.

Q. Say good-bye to her, that's all? A. (witness nodded head affirmatively.)

Q. Did you know Mr. Colten prior to the time that you went to the airport on March 3rd? [146] A. Yes.

Q. In what connection? A. We're friends.

Q. Let me ask you, Miss Phlipps, did I understand you to say that after this patrolman leaped over this car and

grabbed Mr. Colten, Mr. Colten was backing up away from him? A. He backed up because the patrolman was . . . oh, what's the word I want to use? Walking toward him. Not like walking toward him but like—what's the word? Not threatening. Just kind of pushing him like.

Q. He already grabbed him and he was still pushing him, is that it? A. Not pushing exactly. I can't think of the word I want to use. Like . . . I can't think of the word. Kind of a threatening manner.

Q. Had he already grabbed hold of his arm? A. No. No, not until he said—

Q. Mr. Colten still had his hand in his pocket? A. Yes, he had his hand in his pocket, yes.

Q. You have stated that you saw a bunch of policemen surrounding Mr. Colten? A. That's correct.

Q. Do you know who they were? A. Only a couple on sight. No, I don't know, I don't recollect any names, no.

[147] Q. Was the policeman you saw, I think you indicated that according to your memory you saw a policeman grab Mr. Colten or put his hand up toward his face? A. Yes. That was the county policeman, a large man.

Q. That wasn't the State Policemen? A. No, that particular one was a large man. I saw a State Policeman hit him on the head.

Q. Who was the State Policeman? A. I don't know.

Q. Was that the arresting officer? A. It possibly could have been.

Q. But you don't remember? A. It's not that I don't remember. I don't know his name.

Q. Well, was it the officer who, according to your testimony, leaped over the hood of this car? A. Most likely.

Q. Most likely, but you're not sure? A. No, because they all look alike to me.

Q. I see. Was it your testimony that this policeman, after he leaped over this car, said to Mr. Colten, "I've had enough of yoy today, loudmouth?" A. Was it that policeman?

[148] Q. No, is that your testimony? Is that what happened? A. The arresting officer, if supposedly he arrested him, say—?

Q. No, excuse me, Miss Phlipps, you didn't understand my question. A. No, I didn't.

Q. Was it your testimony that a policeman leaped over the hood of the car and said, "I've had enough of you, loudmouth?" A. Yes.

Q. To Mr. Colten? A. Yes.

Q. What was Mr. Colten doing at that time? A. Standing there looking around, saying absolutely nothing.

Q. He hadn't been saying anything the entire time you were there, is that it? A. Nothing loud at the time that we were parked there, no.

Q. How close were you standing to Mr. Colten the entire time? A. Within three feet at all times except when he was on the road with the policeman.

Q. I see. Were you with Mr. Winkle? A. Yes.

[149] Q. The entire time? A. Yes.

Q. Were you ever with Mr. Winkle in the grassy area off to the side of Mr. Colten's car, some 20 to 25 feet away from that car? Maybe if I indicated—? A. Yes, please, if you don't mind.

Q. Were you ever with Mr. Winkle in this genera area A. No.

Q. Well, if Mr. Winkle says he was in that general area with you, he's wrong, isn't he? A. I don't remember being there. It seems to me like most of my time was spent up by the patrol car.

Q. When is the last time you and Mr. Winkle and Mr. Colten got together and reviewed your testimony today? A. And reviewed our testimony today?

Q. Yes. Reviewed what you were going to testify about today? A. The last time I saw Mr. Winkle was Friday, here in court.

Q. When was the last time that you and Mr. Winkle and Mr. Colten and the other witnesses—? A. Oh, Thursday before we went to trial, all of us got together with the defense attorneys.

Q. To kind of recall what you all were going to [150] testify about? A. No. To recall what we had seen.

Q. All of you got together in the same room? A. Certainly.

Q. Kind of exchanged views on it, is that it? A. If you want to call it exchanging, yes.

MR. MOLONEY: That's all.

REDIRECT EXAMINATION

BY MR. GOLDMAN:

Q. Miss Phlipps, did you see whether there was a shoulder on the other side of the road?

MR. MOLONEY: I think this is improper redirect.

THE COURT: It is. That's new direct examination.

MR. GOLDMAN: Your Honor, there was a question on cross with respect to the cars not being able to park anywhere but in the middle of the road.

THE COURT: All right, go ahead. Just move it along a little faster.

Q. Do you recall seeing whether there was a shoulder on which a car could park on the other side of the road? [151] A. No, sir, I'm sorry, I don't.

Q. Did you see whether there were any cars parked on the opposite side of the road? A. There were no cars parked on the opposite side of the road.

Q. When the troopers had Mr. Colten, were any of them facing you? Could you see their faces? A. No.

Q. The area that the prosecutor indicated on the grass, some 20 feet, I think he described it, away from Mr. Mendez' car, could you have passed through that area in the course of waoking from Mr. Winkle's car to—? A. That would be the only time. That would be the only time because I don't remember ever standing that far away from the patrol car except when we got out of our own car.

Q. What instructions did you receive concerning the testimony you are to give today? A. No instructions.

Q. Were you told whether you should tell the truth? A. Yes. Yes. Yes, always to tell the truth.

Q. What instructions, if any, did you receive concerning any differences in the recollection of the events between you and the other people who were present? A. Only that everyone was standing in a different position and we all see things differently. We all notice [152] other things.

Q. And you were instructed to try to conform your testimony? A. No. Just to give it as we saw it.

MR. GOLDMAN: That's all.

GUY M. MENDEZ III, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MRS. WILSON:

Q. Would you give your name and address for the record, please? A. Guy M. Mendez III, 663 South Limestone, Apartment 2.

Q. Are you a student at the university, Mr. Mendez? A. Yes.

Q. On the afternoon of March 3rd, following the Nixon demonstrations, when you were returning from the airport, can you tell us what happened? A. Well, I pulled out off the grassy area, and hadn't gone more than 50 or 100 feet when I noticed a police car in my rear view mirror signaling me to pull over, so I pulled over and Officer Miller came up to my window and told me that he was going to tow the car in, the plates were expired and all that.

[153] THE COURT: Keep your voice up, now.

Q. Did he tell you he was going to tow the car in? A. No, not at that exact minute. He explained, you know, why he pulled me over, and . . .

Q. That your plates were expired? A. Right.

Q. You were sitting in the automobile at this time that he told you this? A. Right.

Q. What happened next, Mr. Mendez? A. Well, Officer Miller told me to get out of my car and come back in his car, so I had pulled over on the side of the road, and I got out and left the people that were in my car and went and sat with Officer Miller.

Q. How many people were in your car, Mr. Mendez? A. Five, I believe.

Q. Five including yourself? A. Including myself.

Q. Including yourself? A. Yes.

Q. Did those five get out of the automobile? A. No.

Q. They stayed in the car? A. Right, except when they had, you know, Officer Miller said they had to leave and get other rides, [154] and then, of course, they left.

Q. Did you see the defendant Colten during the period of time when you were leaving your automobile and walking back to the trooper's car? A. Well, I first remember seeing him when I was sitting in the car and I was talking to Officer Miller, but I don't really recall seeing him as I was walking back to Officer Miller's car.

Q. At the time that you were sitting in Officer Miller's car, what side were you sitting? A. Sitting on the right hand side, the curb side.

Q. On the inside of the passenger's side of the automobile? A. Right.

Q. In the front seat? A. Yeah. Right.

Q. Where did you see Mr. Colten at that time? A. On my right along the shoulder.

Q. Was he in the road? A. No.

Q. Did you at any time see him in the road? A. Later wh n the police brought him behind the van.

Q. Did you speak to Mr. Colten? A. No. I was very confused at the time. I was trying to pay attention to Officer Miller and don't remember [155] any real conversation. I might have mumbled something, you know, about—I did tell him they were towing my car or that they pulled me over and were going to tow it.

Q. And Mr. Colten spoke to you at some time while you were seated in that side of he car? A. Right. He wanted to know what happened or "what's going on."

Q. He asked you—I beg your pardon? A. "What's going on," I think.

Q. He asked what was going on and you mumbled something quickly? You were busy with Officer Miller? A. Right.

Q. Approximately how many people were around in the immediate vicinity of the automobile at that time? A. Around the vicinity—in cars and—?

Q. No, out of the automobiles, standing around, walking around? A. When I was sitting in Officer Miller's car?

Q. Right? A. There were four, I'd say, at the most, students, and I noticed a gathering of policemen suddenly appeared.

Q. Can you approximate how many officers were there? A. Six, seven, eight.

Q. Were you aware of any police cars in the road? [155] A. Yes, the van that they put Lew Colten into was parked in the road, almost parallel with my car which was ahead of Officer Miller's car.

Q. Were you aware of any "no parking" signs in the area where you pulled over? A. No, I wasn't. There was a large number of cars in that area, not only student demonstrators but Young Republicans and people of that sort.

Q. Did you see Mr. Colten apprehended by the police? A. On the side of the road?

Q. Yes? A. Yes.

Q. Where was he standing at the time that he was taken into custody by a police officer? A. Well, he was standing on my right, and suddenly a police officer had Lew's arm behind his back and began pushing him in front of the car I was sitting in, over towards the van and another group of four or five policemen, I guess.

Q. Mr. Mendez, could you hear what the police officer and Mr. Colten were saying? A. Lew was saying, "Let me go," or something of that nature, and I just heard, you know, voices. I really, you know, don't have any clear recollection of what he was saying.

[157] Q. Mr. Mendez, are you a close friend of Mr. Colten? A. Oh, I'm a good friend. I don't know, you know, it depends on your definition of close friend. I've only known him for about a year now, I suppose. Half or three-fourths of a year. Yes, I'm a, you know, friend, close friend if you want to call it that. I like him.

Q. After the police officer took Mr. Colten into an armhold with his arm behind him and marched him toward the road, what did you see? A. Well, as he pushed him up towards this other little group of policemen, suddenly a county policeman got out of the van on the right hand side and just kind of made a beeline towards Lew, and as soon as he got there he reached out and grabbed the left side of Lew's moustache and started tugging on it, and I heard Lew scream and then I saw a fist coming down, Lew falling sort of half way down; and then the same fellow that had pulled his moustache lifts him back up by his hair. Lew was screaming, and I couldn't make out what he was saying, and then they just pushed him on into the van.

Q. Mr. Mendez, was there—You testified that you had pulled off onto the shoulder of the road on the right. Was there a shoulder of the road on the left? A. On the opposite of the road, yeah, I believe so because as I was coming in, I noticed a friend of mine [158] had been pulled over also for not having his new license plates.

Q. At the time you're testifying to, the incident to which you are testifying, was anyone parked on this shoulder on the other side of the road? A. Not that I recall.

MRS. WILSON: That's all.

CROSS EXAMINATION

BY MR. MOLONEY:

Q. Mr. Mendez, you indicated that you really didn't recall talking to Lew Colten because you were trying to pay attention to Trooper Miller, is that right? A. That's right.

Q. Was Mr. Colten interfering with you paying attention to Trooper Miller? A. No, not at all. He was simply asking, you know, what was going on, and I tried to tell him the best I could that my car was being towed away.

Q. Did you see Mr. Colten alongside your car prior to the time you went back to Trooper Miller's car? A. Yes. Yes.

Q. The first time you saw him was up there on the driver's side of your car then, wasn't it? A. Right.

Q. Did I understand you to say that you noticed the police car in your rear view mirror? [159] A. Right. When I pulled off, I had seen it sitting still over there, and when I pulled off, I, you know, just a natural glance in my rear view mirror and I–

Q. The rear view mirror, right here, the one inside the car? A. Yeah.

Q. He was behind you? A. Right, with the flashing light, you know, it can't help but catch your eye.

Q. All right. A. If you've got a good eye.

Q. Mr. Mendez, was your license place expired? A. Yes, it was.

MR. MORONEY: Thank you, that's all.

REDIRECT EXAMINATION

BY MRS. WILSON:

Q. Mr. Mendez, one more question. Did Trooper Miller complaint to you during the interval that you were sitting in the car about Mr. Colten's interfering with the process of giving a citation? A. No, he did not.

MRS. WILSON: Thank you.

[160] THE COURT: We'll take a short recess at this time. We'll be in recess of Court for about 20 minutes.

Following the foregoing recess the defendant was present in open court and represented by his counsel, and the evidence for the defendant continued to be presented.

GARY LEE SEALE, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GOLDMAN:

Q. Please state for the record your full name and address. A. My name is Gary Lee Seale, live on 820 Malabu Drive.

Q. Would you spell your last name for the recorder, please? A. S-e-a-l-e.

Q. On the afternoon of March 23rd did you leave Blue Grass Field in Mr. Colten's car? A. Yes, I did.

Q. How did you come to be in Mr. Colten's car? A. Well, I was out of a ride. I came over with somebody else

and Lew asked me if—asked the people around if anybody needed a ride and I said, "Yes," so I got with him.

Q. Did you know Mr. Colten at that time? A. No, not personally.

[161] Q. Would you say that louder, please? I didn't hear it. A. No, not personally.

Q. Not personally? Who else got into the car besides you and Mr. Colten? A. James Germalick.

Q. Was there anyone else in addition to Mr. Colten, Mr. Germalick and yourself? A. No, there wasn't.

Q. Where did you sit in the car? A. The back seat.

Q. Where did Mr. Germalick sit? A. Front seat.

Q. Was there room for any additional passengers in that car? A. Yes, there was.

Q. Approximately how many? A. About three, possibly four.

Q. As you were leaving the airport in that car did Mr. Colten pull the car over to the side of the road? A. Yes.

THE COURT: I think maybe we might proceed if we let him tell the story, whatever it is.

MR. GOLDMAN: Yes, Your Honor.

[162] Q. Would you describe what you remember taking place there? A. We just left a parking lot and we were driving down the road, and we noticed that one of the other cars had been pulled over and so we pulled up behind the officer's car and parked. Lew got out and went forward to find out what was going on, and a little while later several police officers came by and stopped, and they got out and one was talking to Lew and asking him to leave.

Q. Where was Mr. Colten and the police officer at this time? A. They were at the side of the road, toward the grass.

Q. Would you go to the board, please, and point out where they were? Let us assume that the yellow vehicle is the police vehicle. A. Oh, they were standing right here.

Q. Would you get to the other side so the Court can see where you're pointing? A. Yes.

Q. Approximately at the right front fender of the police vehicle? A. Yes.

Q. About how far away from it would you estimate? A. Three feet.

Q. Be seated again, please. Where were you at [163] this time, sir? A. I was still in Mr. Colten's car. I was in the back seat.

Q. Was the windows open or closed? A. Open.

Q. Could you hear Mr. Colten saying anything? A. No, I could not hear Mr. Colten.

Q. Did you observe his conduct? A. Yes.

Q. How was he conducting himself? A. He was calm.

Q. Was he talking— Did he seem to be talking to the police officer? A. Yes, he was talking, but he was too low, I couldn't hear what he was saying, and he was gesturing a little bit.

Q. Could you hear the police officer? A. Yes, I could.

Q. What could you hear the police officer say? A. He was asking him if he was going to leave.

Q. In words what do you recall him saying? A. "Are you going to leave?"

Q. Did you hear the police officer address Mr. Colten in any particular way? A. Just asked him to leave.

Q. Did you at any time get out of the car? [164] A. Yes.

Q. What caused you to get out of the car? A. The officer grabbed Lew and was taking him off. I got out of the car at that time to start taking pictures.

Q. You had a camera with you? A. Yes.

Q. And why did you take pictures? A. Well, I had hopes of being a photographer and that was my purpose for being there, and I thought that would be appropriate.

Q. And how many pictures did you take? A. Three.

Q. Did you hear the officer say anything further to Mr. Colten after he grabbed him? A. No, I didn't.

Q. What did the officer and Mr. Colten do then? A. The officer grabbed his arm and pinned it behind him and was taking him off, and at that time I was proceeding to

get out of the car, and so I got out and started taking pictures, and at that time several other officers were coming over, helping– the paddy wagon drove up and one of the officers jumped out of the car at that point.

Q. Did you hear that officer say anything? [175] A. Yes. He said, "We'll take care of that one."

Q. Was there any characteristic tone in his voide? A. Just like he was glad. Glee, you might say.

Q. Glee, did you say? A. Yes.

Q. Was there any particular expression on his face? A. Yes, he was grinning.

Q. He was grinning? Did you observe anything further happen to Mr. Colten? A. At this time I was taking pictures and I could not really see what was really going on. I just heard Lew screaming like he was in pain or something like that, and then the last thing I saw they were putting him into the wagon.

Q. While you were either in Mr. Colten's car or out on the grass did you observe the conditions of traffic? A. I was not paying any attention to it.

Q. Did you observe whether there were any signs on that side of the road that said "no parking" or words to that effect? A. Yes, sir.

Q. What did you observe? A. Signs that said "no parking."

Q. Where were they? A. They were on the right side of the road.

[166] Q. On the right side of the road? A. Yes.

Q. Could you go to the board and show approximately where they were? A. No, I couldn't. I just remember seeing signs.

Q. You remember seeing them in the area where you were parked? A. Just along the road. I couldn't pinpoint the exact location of the signs.

Q. Did you see them going to the airport or coming back?

MR. MOLONEY: Your Honor, he's already testified he saw them on the right side of the road and you're talking

about leaving the airport. I think it's obvious where he saw them.

MR. GOLDMAN: Well, Your Honor, it depends on which direction you're traveling in as to which is the right side.

THE COURT: Were they on the side where you were parked? A. I saw the signs on the way to the airport, on the right.

[167] Q. So that the signs were opposite the side of the road that Mr. Colten's car was on? A. Yes.

Q. Did you notice whether there were any people, any civilians in the road during the time that Mr. Colten's car was pulled over to the side? A. No, I didn't.

Q. You say you did not? Do you recall that there were no people in the road or you cannot recall whether or not there were? A. I just can't recall seeing anyone.

Q. Did you see any groups of people other than police officers? A. I saw one or two people maybe walking around.

Q. And where did you see them walking? A. They were on the side of the grass, on the right side of the cars.

Q. How many police officers did you see in that area? A. On the grass?

Q. Generally? A. Just in the area of the cars?

Q. Would you describe how many officers you saw and where you saw them? A. Five to six, six or seven possibly.

[168] Q. And where did you see them? A. They were all around, different places.

Q. Any in the road? A. Yes, there were some in the road.

Q. Any on the grass? A. The arresting officer was on the grass.

MR. GOLDMAN' Nothing further, Your Honor.

CROSS EXAMINATION

BY MR. MOLONEY:

Q. Mr. Seale, what was the purpose of you going out to Blue Grass Field on March 3rd? A. Well, I'm a photographer.

Q. For who? A. I'm an amateur photographer and I was going out to take pictures of the events, and working on building up a portfolio, and I'm interested in photo journalism.

Q. I see. Did I understand you to say that you knew Mr. Colten but not personally on this day? A. I had just seen him around.

Q. Did you know him by reputation or something? A. No, I had just seen him down town previously and seen him around.

Q. You knew what his name was? A. No, not at that time.

MR. MOLONEY: You didn't? [169] That's all.

THE COURT: What pictures did you take? A. I took a picture of from the time that the officer grabbed him and started him along.

THE COURT: Do you have the pictures with you? A. Yes. One picture I did not bring.

(The Court examined some photographs but they were not introduced as part of the record.)

GENNELLE GEIS, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GOLDMAN:

Q. Would you please state your name and address? A. My name is Gennelle Geis, and I live at 332 Aylesford Place.

THE COURT: You're going to have to talk louder than that.

Q. Would you repeat it, and louder, please? A. Okay. My name is Gennelle Geis, and I live at 332 Aylesford Place.

Q. Would you spell both your first and last name for the record, please? [170] A. Okay. My first name is spelled G-e-n-n-e-l-l-e and my last name is G-e-i-s.

Q. On the afternoon of March 3rd were you at Blue Grass Field? A. Yes, I was.

Q. Would you describe how you left Blue Grass Field, with whom, and what happened as you were leaving Blue Grass Field? A. Well, we were over there because Mrs. Nixon—

Q. Would you speak louder and more directly into the microphone, please? A. All right. We were over there because Mrs. Nixon was leaving and we left the parking lot, and I don't know who I was with, I didn't know the driver of the car, and we saw that Guy Mendez had been pulled over so all of the cars pulled over because we were wondering what had happened, and so then a few people got out of the car and I was one of the people that got out of the car to go see what was happening, and we walked up to—Do you want the whole thing?

Q. Well, continue. A. All right. So we walked over to Guy's car, and so George looked—this girl who is in one of my art classes, she said, "Don't leave us," you know, see what was going on, "Don't leave us here."

[171] Q. This was a passenger in Mr. Mendez' car? A. Yes, and so by that time this policeman, kind of young looking, very tall, and he looked at me and said, "Would you leave, please?" And I asked him, I said, "What is going to happen to these people in the car?" And he said, "Well, I don't care, let them walk." So I turned around and by that time I heard Mr. Colten screaming, and so then I turned around and I saw these policemen hitting him and he fell on the ground, and they picked him up again and then they threw him into the paddy wagon.

Q. Was that the first time you saw Mr. Colten? A. No, I saw him at the demonstration.

Q. I mean the first time after arriving in the vicinity where the cars were parked? A. That was the first time I clearly saw him. The other time I saw him, I got up there kind of soon and they were taking Guy into the policeman's car to talk to him, I guess, about his license plate, and I saw Mr. Colten in between the cars on the gravel, but I didn't see very much what happened.

Q. Did you see any officers speak to Mr. Colten? A. I saw a policeman speak to him, but I did not hear what happened, and I'm not, you know, really sure.

Q. Where was Mr. Colten at that time? A. Mr. Colten was either between the cars or [172] on the other side of the cars, I'm not really sure on this because when I saw the policeman speaking to him, another policeman was talking to me, and I really was paying more attention to what the policeman was saying than what Mr. Colten and the other policeman were saying.

Q. Would you be able to describe this policeman you saw speaking to Mr. Colten? A. Not really.

Q. Do you know whether he was the policeman who brought Mr. Colten toward the police wagon? A. I really don't know because when I saw Mr. Colten being hit there were three policemen and I didn't see.

THE COURT: You're letting your voice drop down. A. Oh. Okay. Well . . .

Q. Did you hear anything that was being said to Mr. Colten? A. No, I didn't.

Q. Did you hear anything from Mr. Colten other than the screams which you previously described? A. No.

Q. Did you notice whether there were any signs on the side of the road where the cars were which said "no parking" or words to that effect? A. No, I didn't.

[173] Q. Did you see any people other than policemen in the road at any time while you were at this scene? A. Well, the only time I saw anyone else in the road was when they had drug Mr. Colten into the paddy wagon, and that's the only time.

Q. Can you recall what the conditions of the traffic on the road were during this time? A. There was no traffic at all that I saw. I didn't see any at all.

MR. GOLDMAN: That's all, Your Honor.

CROSS EXAMINATION

BY MR. MOLONEY:

Q. Miss Geis, when did you leave the parking lot at the airport? A. You want a time, about?

Q. No, just as soon as the demonstration was over? A. Yes, just about. You know, it took awhile to get into the cars and things like that, but it was very, very soon after.

Q. Everybody left at the same time? A. Just about.

Q. Did I understand you to say that all the cars pulled over? A. I don't think all of them did. I'm not really sure because I'm not even sure how many people were [174] there or how many cars were there.

Q. How many cars pulled over to the side of the road? A. I really have no idea because—

Q. Five? A. I would say it was between . . . I know there weren't more than ten. I'm almost positive not more than ten. It could have been between ten and seven, ten and six, I really don't know.

Q. These were the cars in which the individuals who were at the demonstration were in? A. I imagine they were all at the demonstration.

Q. Did you go back to Mr. Mendez' car just as soon as you stopped? A. Yes, I got out of the car.

Q. How did you go back there? A. I got out—I was sitting on the left hand side—no, on the right hand side of the car which was facing towards the grass. I got out on that side.

Q. Did you go up on the grass or on the road? A. On the grass.

Q. Did I understand you to say that you saw—You weren't sure whether Mr. Colten was between the cars or on the other side of the car? A. Well, you see, it all happened within a space [175] of about five to seven minutes, and during that time the policemen were coming toward me, and when you're in that kind of situation you don't pay that much attention to the other people around you.

Q. Were you on the grass or on the road? A. I was on the grass.

Q. Never on the road? A. No.

Q. Did the individuals in these other seven to ten cars get out and come up there? A. No. Not that many peo-

ple really came up. Like out of our car there were only two people went up there.

Q. Everybody else just sat in the car? A. A lot of people were in the cars, yes. It was like everyone was sending a delegate to see what was going on.

Q. Everybody sent a delegate up to find out what was going on? A. Well . . .

Q. Two out of your car? A. That was just an analogy.

Q. Were you there when the police first pulled up? A. Which one?

Q. Well, I'm assuming you were not there when the policeman pulled Mr. Mendez over? A. No.

[176] Q. Were you there when the—?

MRS. WILSON: Let her answer the question, please.

MR. MOLONEY: I thought she had.

A. Well, I wasn't there when the policeman pulled Mr. Mendex over because, you know, because that's why the other cars pulled over.

THE COURT: You're letting your voice drop again. The court reporter can't even hear you.

A. Okay. That's why the other cars stopped, so when . . . I really only saw two other policemen cars pull up, so then . . .

Q. Where did they pull up? A. One pulled up right next to Guy's car. Well, I think the other one pulled up first. I'm almost positive of it because the paddy wagon came in like this.

Q. Were you there when those cars pulled up? A. Yes. Yes.

Q. Where were you? A. I was right next to Guy's car. That was about the same time George looked at me and said, "Don't leave us."

MR. MOLONEY: That's all.

THE COURT: How many in the cars had gone up around Mendez' [177] car. A. In front of Guy's car.

THE COURT: Around his car. A. Around his car? You mean passed it and pulled up?

THE COURT: How many were in the vicinity of his car? A. How many people?

THE COURT: Yes. A. Oh. . . .

THE COURT: Not counting police officers.

A. It didn't seem like there were more than ten or 15 people, but I really . . . I really don't know for sure.

THE COURT: You say the police officer approached you and I assume kind of frightened you a little bit. A. Well, he was really very rude and I, you know, it really kind of scared me because like I couldn't understand why . . . because when I asked him, you know, I was really concerned about the people because Blue Grass Airport is really a far way out, and I looked at him and said, you know, "What about these people in the car?" And he said, "Well, just let them walk."

[178] THE COURT: Did he ask you to leave? A. Yes, he did and that's when I turned around because he looked like he was going to hit somebody.

THE COURT: Did you hear him ask the others to leave also? A. Now, that police officer didn't ask anyone else to leave.

THE COURT: Did you hear the police officers ask anyone else to leave? A. Not really. It was more like in, you know, separate police officers confronting separate groups. You know, I think it looked like there was one police for every person that was there, ans so it was really. . . .

THE COURT: How many policemen were there approximately? A. It looked like there were about ten. I really don't know for sure how many policemen were there.

THE COURT: All right. Step down.

Thereupon both sides announced closed.

[179] THE COURT: Do you wish to make a statement?

MRS. WILSON: Yes, sir.

I think first we want to thank the Court for what to the layman would probably have been a monumental amount of time devoted to a disorderly conduct charge. Of course, most people would regard this as fairly insignificant. I hope that we can demonstrate that this case is a whole lot more important than the $10.00 and costs fine or than the charge of disorderly conduct itself.

From the statute of disorderly conduct, I think we have learned that there are two elements which must coalesce in order to find Lew Colten guilty of disorderly conduct.

First we must find him guilty of the specific acts of conduct which are described in the three sections which we have already outlined as applicable to this particular charge. That is, he must be found guilty of having obstructed vehicular or pedestrian traffic, or having congregated with other people in a public place and having refused to comply with a lawful order of the police to disperse, or of having created a hazardous or physically offensive condition by any act that served no legitimate purpose.

Additionally, we must find the element of the intent to cause public inconvenience, annoyance or [180] alarm.

We've already gone into the constitutional overtones of this particular statute. I think we have argued for His Honor the argument of overbreadth and void for vagueness, and we particularly say as to the overbreadth argument this is terribly important to an interpretation of the required intent. It is certainly necessary, if this statute is not to be unconstitutional, because of the intent to cause public inconvenience, annoyance or alarm, it is necessary that that particular section be construed very narrowly and be given the most strict interpretation.

We do wish to remind His Honor of those arguments and to incorporate them into the closing argument that we want to give now. We would also like to take the opportunity to clarify the New York State, which the prosecutor cited, that was—in his argument earlier—that was People v. Kagin. This was a case which arose in the lowest court, the lowest criminal court in New York. It did not go any higher. It was a case which arose under the disorderly conduct statute identical to the one which Kentucky has—the New York statute from which Kentucky took its statute, present statute. It involved a week long demonstration of a large group of people, and the announced purpose of that demonstration was to bring to a complete halt the operation of the Selective Service System in New York.

[181] The induction center in New York is in Lower Manhattan at the base of the Wall Street area and in a very busy section of New York City. The defendant in the Kagin case, in the words of the court, "solicited, requested and importuned a large group of people to march in the street without getting the required parade permit." They did march in the street at his behest and they blocked traffic at approximately ten minutes of seven on a working day in this section just below Wall Street, at a time when the evidence showed that close to a million or more people passed into the Wall Street area to go to work.

I think that there can be no question at all but what in the case which the prosecutor cited there was an actual fact of obstruction and blocking of traffic, and that this is a whole lot closer to the situation which the disorderly conduct statute must envision if we are going to construe it in its narrowest fashion.

There are, however, a few other New York cases which have arisen under this statute which should be helpful to this Court in interpreting the statute. There is the case of the People v. Smith which arose in the New York Court of Appeals—which went to the New York Court of Appeals. In that case two police officers in the very early hours of the morning had placed a man [182] under arrest. They had arrested him, and in the process of arresting him had injured him. He had been injured. The police were in a parking lot in the wee hours of the morning, ministering to thisinjured man, when the two defendants, one of whom had apparently been drinking, came to the parking lot, saw the police, went up and said to them, "What's going on around here?" A crowd of approximately 25 or 30 people quickly gathered in the parking lot, with two policemen in the dark of night. The police ordered the defendants to move on and the defendants started to move on, but then they drifted back and the crowd of 25 to 30 people drifted back with them.

There were two charges placed against the two defendants. One was a charge that they had refused to obey an

order of the police to move on and one was a charge under another New York statute that they had caused a crowd to collect. The lower court dismissed the charge about refusing to obey the police order to move on, and the New York Court of Appeals subsequently threw out the second charge about causing the crowd to collect.

It seems to me that this was an extremely difficult arrest situation—very different from the present fact case in which a trooper was giving a citation and hauling off a car for expired license plates. There was a real threat. It was late at night. There were two [183] police officers as opposed to the five to twn to 15 police officers who were at this present scene.

They were confronted at the present scene by nothing more than a group, varying in size according to the witnesses, of students. There has been no testimony whatsoever as to any hostility, and it seems to us that this Smith case should give good guidance to the Court.

The second case is a case which went to the Supreme Court in New York County, the People v. Solomono. Now, this is a higher court than the criminal court which we referred to in Kagin but it is not the highest court of New York. The facts in that case we were more remote. The defendants were picketing the Soviet Embassy, and they were asked by the police to keep their picket line on the sidewalk across the street from the Soviet Embassy. They asked permission to move back onto the adjoining sidewalk, they were refused, they did it anyway. When they moved back they were arrested and charged with disorderly conduct under this same statute that we're proceeding under now.

The Supreme Court of New York County held that there was no authority in the police to close the sidewalk completely to the public and peaceful assembly. This was the same right of free assembly which we are arguing which was protected by New York, which we are arguing should be protected in this particular case.

[184] Now, earlier in our—in this case, we referred to a case which came down from the Supreme Court of the United States last week. We have just been able to get a copy of the Law Week Review or advance opinion on that case, and it seems to us to offer very little help in our particular, under our particular facts. In the case of Bachelor v. Maryland, the defendants were involved in a sit-in at an induction center. There was a group of 30 to 40 people. They were sitting in inside the offices, and they were ordered at the end of the day to leave so that the offices could be closed. They refused to leave and they were forcibly ejected by United States Marshalls. They were carried out, and, according to their testimony, left upon the sidewalk in front of the induction center.

They continued to stay there and they, by all the testimony, apparently obstructed a large portion of the sidewalk. They were prosecuted for disorderly conduct amounting to a breach of the peace which is the Maryland statute in question, and they were found guilty by a jury under a general verdict under specific instructions. It was the instructions of the court which were challenged, which caused the verdict to be reversed by the Supreme Court. It seems to us that although there are certain elements of obstructing particular passageways or of refusing lawful order of the police to disperse, [185] this case of Bachelor v. Neal cannot be equated specifically with the particular facts of this case, but even in Bachelor v. Neal, we find the court saying that because of the possibility that the jury may have found the defendants in that case guilty because their views were unpopular or their expressions tended to incite public offense, that the conviction of these defendants could not stand because, as the Court is well aware, this kind of reasoning or such conviction may not stand.

Now we come to the question of what actually did happen on the afternoon of March 3rd. Guy Mendez was traveling with four other people in a small automobile on the Airport Road when he was pulled over by Trooper Miller, who came in behind his car, pulled him over, Guy Mendez pulled over on the shoulder, Trooper Miller pulled over on the shoulder directly behind him.

Colten, the next man in the line, who was traveling with two people in his automobile, and therefore space in his automobile, pulled over to find out what was wrong. It is obvious from the testimony that Colten apparently attempted to talk to Mendez, perhaps attempted to ask him or question him or advise him as to why it might be that his registration really hadn't expired and he might be able to get out from under the charge of expired license plates. Trooper Miller says that the traffic was [186] heavy. This was contradicted not only by the testimony of all of the defense witnesses, who say that this procession or cavalcade of cars was the last group of people leaving the airport, it is also contradicted by Capt. Mayes' testimony. He said, if you recall, that he came out of the turn from the parking area onto the airport access roa some 200 feet up the road and he could see clearly, with no one in front of him, all of the way down to where these cars had begun to pull over. We would maintain that if there was a distance of approximately 200 feet that Capt. Mayes could see, there wasn't a whole lot of traffic rushing in there to fill in this 200 feet gap.

It's also contradicted by Trooper Miller's own statement because he says he was standing in the road with Guy—beside Guy Mendez' car and he would have stayed there longer except for the fact that Colten came along and began to "interfere" with his process of citation. Trooper Miller didn't seem to feel that he was in danger by heavy traffic so that he himself would be causing obstruction if he stayed there on the side of the road.

Trooper Miller describes Lew Colten as having remained in the road area after he got into the car. Trooper Miller tells us that he observed Lew Colten the entire time that he was issuing the citation to Guy Mendez. Frankly, his testimony isn't credible. We would assume that it would be difficult for [187] any trooper in the normal process of issuing a citation, of calling for a wrecker to come and pick up another car, of talking with the man who was going to be given the citation, filling out the forms which he himself

had some 20 items to be filled in, we would assume that it is quite impossible for him to have kept Lew Colten in his vision during the entire time of the episode.

Trooper Miller at no time said anything to any other police officer about needing help in order to write his citation for Guy Mendez. He said nothing to Lew Colten about no parking, he said nothing to anybody about getting out of the roadway: Trooper Miller made no request for help in concerning Lew Colten. Miller did say that he had to take Guy Mendez back to his automobile in order to write a citation, to get away from Lew Colten.

We would submit, Your Honor, that it's far more simple to believe that Trooper Miller was reluctant to write a citation in front of an automobile containing at least five students, where he was leaning over on the side of the road talking to that individual at that particular point; that it was a routine matter for him to say, "Come back into my automobile and we'll talk this over and fill out this form," and that this is what he did, routinely asked Mr. Mendez to leave his car and go back and get into his automobile and take care of the [188] problem of the citation at that point.

Capt. Mayes says that he saw Lew Colten in the group of four or five individuals all standing in the road at the time he drove up—at the time he turned the corner and came onto the airport access road, but he admits that he did not see him there when he told the individuals in the group to get back into their cars. He admits that he was unable to place him in any particular portion of the group between the time that he actually arrived on the scene and the time of the taking into custody by Officer Harlowe.

It's far more likely, after having listened to the rest of the testimony, that Lew Colten, at the time that Capt. Mayes pulled up, was actually over on the passenger's side of Trooper Miller's car, where he admits that he was trying to find out what was going on and whether or not he could be of assistance to the people who were left in the Mendez car. Capt. Mayes said that the problem was that the traffic was being obstructed, that the traffic was very heavy, al-

though, of course, he told us earlier that there was no car between him and Colten some 200 feet up the roadway.

The fact of the matter is that the witnesses agree that Mayes was behind Colten, that there was no traffic to be obstructed until Mayes and Brown stopped the car in the roadway themselves, thereby obstructing any [189] traffic, if there was any, behind them, and all of the witnesses agree that neither Capt. Mayes nor any of the police officers said anything to any of these witnesses about "no parking" signs.

The fact of the matter is that if there had been a complaint of no parking, it seems that the apparent remedy for a no parking violation would have been a citation for parking in a forbidden place. Capt. Mayes didn't give any orders to these people in the form of, "Move your vehicles from this place where there is no parking," or even, "Get off the road." What Capt. Mayes and all of the police officers from this time on said was, "Leave, get in your cars and leave."

Officers Brown and Harlowe then pulled up. Now, they've testified specifically that the reason they started asking people to get back into their cars and leave was that they saw Capt. Mayes doing this. Naturally they moved in to reinforce his argument. There was no testimony from any of these people as to a disorderly conduct basis for the charge or a reason for the request to these people to leave. They testified they didn't have any difficulty driving up to the scene. They were unable to effectively show that there was any heavy traffic in the area. Again they didn't say anything about any "no parking" signs in the area. They didn't direct any drivers to move their cars. All they did was say, "Leave."

[190] Trooper Brown testified that the defendant clearly said, "I want to get these people in the car rides back to Lexington." The other witnesses heard him say the same thing. "Yes, I'm leaving but I'd like to get these people some rides back to Lexington." There has been pretty clear testimony as to the State Police complete lack of con-

cern for whether or not the people in the Mendex car were going to be able to get back to Lexington.

Now, it was therefore Trooper Harlowe alone who confronted the defendant and whose testimony must stand as the basis for the disorderly conduct charge. Officer Harlowe admits that, well, he doesn't remember but he may have called Mr. Colten a loudmouth, although everyone will agree that Mr. Colten's demeanor at the time of the arrest was quite, calm and peaceful, that he was in no way violent, abusive or loud. Mr. Colten's conduct certainly couldn't have been described at that time in words such as, "Loudmouth, I've had enough of you today."

The defense witnesses have testified that Officer Harlowe did address the defendant as "loudmouth" and that he was specifically heard to say, "I've had enough of you today, loudmohth."

Officer Harlowe didn't say anything to Lew Colten about, "Move your automobile." In fact, Officer Harlowe testified that he just presumed that Mr. Colten was driving his own automobile, he didn't know [191] it because he hadn't seen him get out of the car. He didn't know whether it was his car. He didn't say anything to anybody about, "Let's keep off the road and not get in the way of the traffic." All he said was, "Leave," at the same time, according to the defense witnesses, most effectively blocking Mr. Colten's exit.

Officer Harlowe testified quite clearly that he doesn't believe that people that look or dress like Mr. Colten should be out around the Blue Grass Airport at any time. In fact, his testimony was to the effect that Colten, dressed as indecently as he is here today, had no cause to be out in public where good people should be. He found Mr. Colten's person and his appearance offensive. He was a little bit tired of having seen Mr. Colten around at various points during the demonstration. In short, he was annoyed by Mr. Colten, he was offended by him.

Trooper Harlowe told Mr. Colten to take his hands out of his pocket, he immediately, as all the testimony corro-

borates, grabbed him in an armhold lock and proceeded with him to the point at which the paddy wagon and the other officers came into the picture. There is conflicting testimony as to whether Harlowe ever said, "You are under arrest." Mr. Colten, Mr. Winkle and Miss Phlipps, Mr. Seale, all testified that there was no such statement [192] made. In fact, all of the defense witnesses testified that Officer Harlowe grabbed Mr. Colten, put him in an armlock and marched him forward, at the same time repeating his original question, "Are you going to leave now," implying that if Mr. Colten did go on and leave, all would be well.

There is no doubt from the testimony which has been entered into what happened right after that. Officer Harlowe delivered Mr. Colten to the other officers, both county and state, they variously pulled his long hair, grabbed his moustache in order to turn him around, and beat him several times with their fists.

There were shouts of pain which everyone in the crowd heard and which drew their attention to the scene. Now, I suppose you might say, "Now, just how credible are these defense witnesses?" After all, they are all students, they are young, probably they were all buddies, maybe they were all anti-Mrs. Nixon. They were out there for a demonstration, and it's very important that we find that these witnesses did testify credibly.

Let's remember that while some of these witnesses did know Lew Colten before this day and that while some of them were out there to participate in the kind of demonstration that he had been involved in all day, there were key witnesses who had never heard of him, never seen him before this time and didn't know him at all. Particularly Craig Winkle and Gary Seale, who testified very closely as to what they saw from a very close vantage point, two or three feet away from the act during the entire course of the arrest. Craig Winkle had never heard of Lew Colten before this time. He just happened to be on the scene and he came in to testify in court in order to tell what he saw.

Now, let's ask what really did happen. I think there can't be any question but what the police came upon a scene in which there was a crowd of people, small or large depending on your testimony, who were standing around while a citation was being issued to Guy Mendez for expired license plates. The police ordered them to leave. Now, the police weren't really concerned about traffic congestion. If they had been, they would have pulled their automobiles over onto the opposite shoulder on the opposite side of the road, but they didn't. They left their automobiles sitting in the one lane of traffic by which automobiles could proceed toward Lexington. They weren't concerned about congestion. They would have told everybody to move off the road. They might have asked people to move their cars. They would have mentioned the fact that there was no parking along this area.

The truth of the matter is that there wasn't enough traffic to be congested.

Both the police and the defense witnesses agree that Lew Colten was not in the road or even near the road at the time of the actual arrest by Officer Harlowe.

That leaves us to ask why the police ordered the spectators to leave. Probably, Your Honor, the truth of the matter is that the police ordered the spectators to leave because policemen, as a rule, don't like to have people around watching when they are issuing citations or arresting people. Now, there are many reasons for this. The immediate reaction of the police officer when someone comes upon the scene of an arrest or a citation is, "Move on." Why is this their reaction?

Young people and black people will tell you that this is their reaction because the police do not want witnesses to acts of brutality. In the overwhelming majority of cases that suspicion is wrong, but it is there. And because it is there, I think it is very important that in this case, more important than it has been perhaps in earlier times, that the right of peaceable assembly on an occasion such as in these

facts right now not be infringed. It is the only way that we can allay the suspicions of these people—the young and the black particularly.

I think we should remind the Court that the Supreme Court has told us on many occasions that it is not against the law or unlawful for an accused to argue with the police, to challenge the police, or to seem verbally to resist the arrest of the police.

The sad fact in the particular case at hand is that there was just such an audience as the police don't like to have. There was a young, impressionable audience of students who were out there because of political interests. They were at the airport, they saw this, they saw and unnecessary manhandling which may or may not be called a beating by the police of Mr. Colten. Even Officer Brown testified that he heard screams which he said might have been screams of pain.

The key fact in this case is that th police order to leave was a lawful order. The issue is not how many times that order was actually given to Mr. Colten, although we have heard testimony that there was no order prior to Officer Harloew's, if a lawful order to leave was given to Mr. Colten only once, then it should have been obeyed, but if an unlawful order to Mr. Colten was given a hundred times to leave the area, he had no duty to obey.

The order which was given went far beyond the necessity of police work or police investigation and it was not a lawful order. It need not have been obeyed.

Moreover, both officers and defense witnesses have testified that Colten had a bona fide reason which he expressed timely, politely, in a gentlemanly fashion to the police for being there. He had a partly empty car. He felt some responsibility for all of these people who had gone out in this cavalcade together from the university. He wanted to see whether he could get the five people in Guy Mendez' car back to town. The police officers testified that they knew of this reason, and we've heard the testimony of the defense witnesses as to the complete lack of concern.

Briefly let us look at the events of March 3rd on the Airport Road from another angle. Let's ask ourselves would any middle-aged, well dressed adult have been ordered to leave under the same circumstances and in the same way as Mr. Colten was? Would any short-haired, young man in a business suit and shirt and tie have been grabbed by the arm, shoved up toward the road, told by the police to get on his way and never mind about his friends, had his hair pulled and his head beaten under those circumstances?

The truth is that Lew Colten was not arrested for disorderly conduct. Disorderly conduct came into it much later. He was arrested because some police, after a long tense day of patrolling during Mrs. Nixon's visit to Lexington, were uanble to resist the temptation, first to order him about and then to grab him a bit roughly and finally to beat up on the defendant. He's a long-haired, radically dressed individual who doesn't look like we like to think of our middle class college students.

Now, once having lost their professional composure, once having blown their cool, as it does, the police were faced with something they had to have an answer, so they filed a disorderly conduct charge and they hope that a skilled prosecutor would be able to come up with a theory under which they may have charged him with disorderly conduct.

In summation, Your Honor, it seems quite clear that the arrest in question under these facts violated Mr. Colten's right to equal protection under the law. Under both the Kentucky law and the Federal law. The disorderly conduct statute must not, it must not constitute to be used to convict a man under the circumstances in the case at hand.

We ask that you find the defendant not guilty.

MR. MOLONEY: Your Honor, Mrs. Wilson and Mr. Goldman, I hope to be very brief, Your Honor.

Once again the Commonwealth finds itself in the quite unenviable position of having to defend police officers. At

least, this is the way that the defense would have us take this case, but I'm not going to fall for the bait, because the facts are uncontroverted.

Lewis Colten was and is guilty of disorderly conduct. These policemen are not guilty. They're not on trial. Lewis Colten is on trial, and he's the man that the judge must decide whether or not was innocent or guilty.

Now, the cold hard facts of the situation are that Lewis Colten on this day in question, undoubtedly a frustrated individual by this time because he had not gained the attention he desired during the day of demonstrations, came upon the scene where one of his cohorts had been legally arrested by an officer of the law, and he decided he was going to interfere, and according to the testimony of Officer Miller he did. Officer Miller asked him to leave, order him to leave one time. Mr. Colten did not.

Upon the scene came Capt. Mayes. Capt. Mayes specifically stated, and this is not contradicted, it was not contradicted on cross examination and upon the witnesses for the defense being called to the stand, Miss Geis, who I commend for her remarkable memory, said that there were ten or 15 people around that car. She remembers what the facts were, but Capt. Mayes comes upon the scene and he says that he specifically remembers telling this group, and Mr. Colten was in this group, to leave four or five times. He ordered them to leave, and then Capt. Mayes left the scene and went down the road and went to each individual car and said, "Leave, leave, leave," because they had a duty to perform, and their duty was to get that road clear, and who was blocking the road? These individuals gathered around Mendez' car.

Along comes Trooper Brown and Trooper Harlowe. Trooper Brown specifically testified that he told Mr. Colten as an individual twice to leave. Trooper Harlowe said, "I heard Capt. Mayes tell them to leave. He's my captain, I follow his orders. I then went about telling these people to leave individually."

He told Mr. Colten to leave, Mr. Colten did not and Trooper Harlowe placed him under arrest. I submit to the Court that at this point Mr. Colten had already violated two provisions of the Kentucky disorderly conduct statute, that is, subsection (e) and subsection (f). He had obstructed traffic along with the group of individuals he was with. Notwithstanding counsel for the defense's commentary upon the case of *People v. Kagin*, that it was decided in the lowest court of New York, Your Honor, I say that though may it be decided in the lowest court of New York, Your Honor, I say that though may it be decided in the lowest court of New York, it stands as law and can be cited and should be cited in this instance because maybe it didn't involve a million people leaving Blue Grass Airport—I doubt if a million people have ever been gathered out there at one time, but there was a substantial corwd there, and they were prevented from leaving by this individual and his friends, standing in the road blocking traffic.

There can be also no question about the fact that these individuals were ordered to leave by the police and that this was a lawful order. The duties of these police that day was to keep that road clear, as Trooper Miller testified. He was attempting to do this, the other policemen there with him also knew of this duty, they were attempting to do this, and they were receiving no opperation whatsoever.

Now, Your Honor, counsel for the defense cited the recent Supreme Court decision of *Bachelor v. Maryland* and said it didn't really apply much to this situation. Well, I don't agree, and I offer a copy of the full opinion of the court, but I read two little points there. I agree with the facts, this was a situation where there was a demonstration in the draft office, but the court after reciting a few things, says that, "There is irreconcible conflict in the evidence as to what next occurred." That fits this situation pretty good. There is an irreconcilable conflict in the evidence here. The prosecution's witnesses testified that the marshalls and police officers "escorted" the petitioners outside and thaat the petitioners thereupon sat or laid down "blocking

free passage of the sidewalk." It then skips a little bit and comes down and it states, "In sharp contrast, defense witnesses said that each petitioner was thrown bodily out the door of the station and landed on his back, that the petitioners were not positioned so as to block the sidewalk completely, and that no police command was given to them to move away; rather, on the contrary, that as some of them struggled to get to their feet they were held down by the police officers until they were picked up and thrown into the patrol wagon."

Your Honor, this case is getting closer the further I read into the opinion, and I differ with Mrs. Wilson on what the court decided this case on. The court, as it specifically states, decided this case because and reversed because there was a general verdict of guilty returned, and the court states at the close of their opinion, "On this record," referring back to the testimony, "if the jury believed the state's evidence, petitioners convictions could constitutionally have rested on a finding that they sat or lay across a public sidewalk with the intent of fully blocking passage along it, or that they refused to obey police commands to stop obstructing the sidewalk in this manner and move on." Then the court goes on to say, "As far as we can tell, it is likely that the verdict resulted merely because petitioners' views about Vietnam were themselves offensive to some of their hearers."

Your Honor, this is our case. We have irreconcilable conflict, but we also have a blocking of vehicular traffic, we have a refusal to move on at the lawful order of the police, and we also have the creation of a hazardous and physically offensive condition, for I ask the Court what else did Mr. Colten's conduct amount to, once he was told to move, other than a hazardous and physically offensive condition that served no legitimate purpose?

And, Your Honor, based upon the evidence, the facts before you, I ask that a verdict of guilty be returned in this case as the statute, which has been held constitutional by a three judge court in this state, as you are aware, that this individual be held guilty under this statute.

Thank you.

THE COURT: It's at moments such as this that I can appreciate the responsibility that persons serving on the jury have. You hear excellent arguments by counsel on both sides, you've had an opportunity to see and observe the witnesses and listen to their testimony, and then you have to make your decision, and I appreciate the fact that it's not always a clear cut type of a case and gives you some concern.

In a case such as this, with a young defendant, young witnesses with him from the university, a young defendant dressing differently than what the great majority of society would believe in, maybe belonging to organizations that a lot of people would frown upon, engaging in activities that the majority of the people would not condone or believe in, the Court finds itself in the position of attempting to lean over backwards to let these young people know that they are entitled to a fair hearing, that they are to be judged in this case not on the basis of their appearance, not on the basis of the demonstration that may have taken their close to the airplane, not on the basis of organizations that they belong to, but upon the basis of the facts surrounding this particular case.

Yet in leaning over backwards to let these young people know that the courts do try to be fair, we have the other concern in that policemen in making arrests are sometimes interfered with in making that arrest, that on occasion they have been interfered with to the extent that recently in California two or three policemen lost their lives when they attempted to effect an arrest.

I'm not saying that in this instance there was any clear immediate danger to the police officers, but nonetheless I can appreciate their concern when people start gathering around at the time they are making an arrest and I appreciate the fact that they may have been somewhat apprehensive on this day in question. I am sure that they heard many things and maybe a lot of this was strictly rumor with

no basis in fact, but nonetheless, I am sure they were somewhat concerned.

I'm not going to again rule upon the constitutionality of the statute. I think we heard ample arguments on both sides, so it comes down to the question and the single question, was there disorderly conduct by the defendant on this occasion.

We heard from the police officers that a group ranging from five up through 15 people were gathered around at the time Officer Miller was attempting to issue a citation, that several cars had parked on the shoulder of the highway. You heard Trooper Miller testify that he left Mendez' automobile and went back to his car and rolled up the windows in order not to be interfered with by this particular defendand. You heard the other officers testify that on two or three occasions they asked this defendant to leave.

It may be that the police officers were hostile toward this defendant because of his appearance, he may have been physically offensive but I don't think that's a violation of the law, but I think that the police officers may have also been a little rougher in this instance than may have been necessary. I don't know, I don't find that they did or did not. I've heard the testimony, but I think the most crucial part of the testimony in this case is that Officer Harlowe, in making the arrest—this is from the defendant's own witnesses, even after he had him by the arm, again asked him if he was going to leave, and it seems inconceivable to me that he would have again asked him if he was going to leave if he had no desire that he do so.

Miss Geis' testimony that there were up to maybe 15 people gathered around and the officers asked them to leave, and the fact that the police officers did park there and block the road, while it may not have been any of the automobiles belonging to the people associated with the defendant, nonetheless, it was their actions which would have brought on the blockage of this road.

I think on the basis of the testimony, and trying to weigh it completely, and listen carefully to all of it, that the Court will have to find that the defendant is guilty of the offense of disorderly conduct in his failure to leave the premises. I think the police do have a right to get a crowd back away from them at the time they are effecting an arrest. I'm not inclined to believe that the reason they want this crowd back away from them at the time they are effecting an arrest. I'm not inclined to believe that the reason they want this crowd [illegible]ay is the fact that they want to commit brutality by the police, but I think this is the exception rather than the rule. I don't believe this is the reason. I believe it is for the protection of the officers and the protection of the person they are attempting to arrest.

I think the evidence, as I say, is sufficient to find the defendant guilty of the disorderly conduct statute, which says that "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating the risk thereof," he obstructs vehicular or pedestrian traffic, or "congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse."

I think that the last one is the category in which the Court will find he is guilty of the offense of disorderly conduct. If he had wanted to help these people, they could have remained in their cars, and after the officer had finished issuing the citation the people could have gotten out and come back and gotten into these other cars.

I appreciate the fact that he may have been wanting to help, but by the same token when the police ask him to leave and he had no lawful purpose for remaining, he should have returned to his automobile.

I find him guilty of this offense, and fix his fine at $50.00

STATE OF KENTUCKY)
) Sct.
COUNTY OF FAYETTE)

I, Thelma C. Estes, Official Court Reporter of the Fayette Circuit Court, do hereby certify that the foregoing 206 pages contained in Volumes I and II constitute a true and complete transcript of all of the evidence and proceedings had on the trial of the within styled action in the Fayette Circuit Court, Second Division, Lexington, Kentucky, before the Honorable N. Mitchell Meade, Judge of said Court, on April 24 and 27, 1970; that the said evidence and proceedings were taken down by me and correctly transcribed by me on the typewriter; that the witnesses were each duly placed under oath prior to giving their respective testimony.

Given under my hand officially as aforesaid, this the 31st day of October, 1970.

Thelma C. Estes
Official Court Reporter,
Fayette Circuit Court,
Second Division
Lexington, Kentucky.

MANDATE

THE COMMONWEALTH OF KENTUCKY,) Spring Term—
The Court of Appeals) May 21, 1971

Lewis Colten
v.
Commonwealth of Kentucky

Appeal from a judgment of the Fayette Circuit Court

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A copy—Attest:

DICK VERMILLION, C.C.A.

By John O. Scott, *D. C.*

Issued June 22, 1971

OFFICE OF
CLERK OF COURT OF APPEALS
FRANKFORT

DICK VERMILLION
Clerk

July 13, 1971

Hon. Alvin L. Goldman
1692 Williamsburg Road
Lexington, Kentucky

Re: Colten (Lewis) Vs. Commonwealth of Kentucky
File #F-167-70

Dear Mr. Goldman:

Appellant's motion for stay of execution and enforcement of mandate (Exhibits attached) has been SUSTAINED by the Court.

Sincerely yours,
DICK VERMILLION, CLERK

By John C. Scott
Chief Deputy Clerk

cc: Hon. John B. Breckinridge
Attorney General
The State Capitol
Frankfort, Kentucky 40601

Clerk
Fayette Circuit Court
The Courthouse
Lexington, Kentucky

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ----------

71-404

LEWIS COLTEN,
Appellant,

—v.—

COMMONWEALTH OF KENTUCKY,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS TO THE COMMONWEALTH OF KENTUCKY

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

LEWIS COLTEN,

Appellant,

—v.—

COMMONWEALTH OF KENTUCKY,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS TO THE COMMONWEALTH OF KENTUCKY

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Appeals of the Commonwealth of Kentucky, issued on May 21, 1971, the order and mandate on which was entered on June 22, 1971, affirming in full the judgment of conviction against the Appellant, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the Kentucky Court of Appeals is reported in 467 S.W.2d 374. Copies of that opinion, the order and mandate of the Kentucky Court of Appeals, and the Notice of Appeal filed herein are attached in the Appendix at pp. 1a-11a, 18a. The opinion of the trial court is contained in the closing pages of the trial transcript and is also attached in the Appendix at pp. 12a-16a.

Jurisdiction

This action was initiated in the Quarterly Court of Fayette County, Kentucky where on March 6, 1970 Appellant was convicted by the court of violating KRS 437.016, the Kentucky Disorderly Conduct Statute. That statute is set forth in the Appendix at p. 19a. Appellant appealed his conviction to the Criminal Division of the Fayette Circuit Court where, pursuant to the Kentucky Rules of Criminal Procedure (hereinafter "Rcr"), Rule 12.02, he received a trial *de novo*. Rule 12.02 is also set forth in the Appendix at p. 20a. By consent, that trial was without jury, and on April 27, 1970 Appellant was convicted of violating KRS 437.016 subsection (f) and a penalty adjudged; that penalty being five times greater than that imposed at the first trial. Upon appeal to the Court of Appeals of the Commonwealth of Kentucky the judgment of conviction was affirmed, the court rejecting, among other contentions of unconstitutionality, appellant's challenge to the validity of KRS 437.016 on the grounds that on its face and as applied to Appellant it is repugnant to the Constitution of the United States. That decision issued on May 21, 1971 and the final order and mandate was entered on June 22, 1971. Notice of Appeal was filed in the Kentucky Court of Appeals on June 30, 1971. The jurisdiction of the Supreme Court to review this decision is conferred by 28 U.S.C. §1257(2). Jurisdiction is supported by *Pope* v. *Atlantic Coast Line R.R.*, 345 U.S. 379, 381-82; *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530, 547; *Largent* v. *Texas*, 318 U.S. 418, 421-22.

Questions Presented

1. Has the Kentucky Disorderly Conduct Statute, KRS 437.016, been rendered overly-broad and unduly vague, in violation of freedom of expression and assembly and of due process of law, by the Court of Appeals' holding that the statute applies to non-obscene, non-defamatory assembly and expression causing mere inconvenience or annoyance to police officers if, in the opinion of the Kentucky courts, that assembly and expression falls below the level of minimum social value?

2. Has the Kentucky Disorderly Conduct Statute been rendered overly-broad and unduly vague, in violation of freedom of expression and assembly, and of due process of law, by application of the statute to convict a person on the grounds that (a) he failed to leave when ordered by the police to do so at the scene of the issuance of a motor vehicle citation to another person where the person charged with disorderly conduct either stated that he wished to observe what was happening or stated that he wished to aid affected persons to secure transportation home; or (b) on the grounds that his presence caused others to congregate in a roadway?

3. Where, under the state rules of criminal procedure, the appeal of a case on law, as well as fact, from a lower criminal court can be had only by trial *de novo* in the court of general jurisdiction, and where upon conviction in such an appeal by trial *de novo*, and without setting forth any special grounds of justification, the court of general jurisdiction fixes the penalty five times greater than that set by the lower criminal court, has the right to

appeal been unconstitutionally chilled and fettered and has the defendant been unconstitutionally twice placed in jeopardy, all in violation of the due process clause of the Fourteenth Amendment.

Statutes and Procedural Rules Involved

KRS §437.016 is found in 1968 Cumulative Supplement to the Kentucky Revised Statutes at p. 1272; and Rules 12.02 and 12.06 of the Kentucky Rules of Criminal Procedure are found in 1968 Cumulative Supplement to the Kentucky Revised Statutes at pp. 1430-31. These provisions are set forth in the Appendix at pp. 19a-20a.

Statement of the Case

A. The Events.

On March 3, 1970, Mrs. Richard Nixon was in Lexington, Kentucky on a widely publicized tour. The record shows that Appellant, Lewis Colten, and others went to the Bluegrass Airport, which serves Lexington, to demonstrate in support of a "peoples" gubernatorial candidate and at the same time overtly to ignore Mrs. Nixon's presence.

Mr. Colten is a young person with a long moustache and long hair who dresses in a manner which the Fayette County Circuit Court described as "differently than what the great majority of society would believe in" (Tr. pp. 202-03, App. at p. 12a). While in the terminal area, at about the time Mrs. Nixon's plane was preparing to take off, Mr. Colten was observed by the arresting officer, Trooper Harlowe. Trooper Harlowe's testimony of this first encounter with Colten was as follows: "[A]s the airplane was getting

ready to leave they [included Colten] came up to me where I was stationed at, at the airport, and said, 'We're going to have a party.' I said, 'Not out here,' so they then proceeded to get over on the lawn of the airport and throw themselves a little whooping and hollering party over there or whatever they call it, creating a scene." Trooper Harlowe's testimony made it clear that he was offended by Colten's style of dress and presence at the airport "with an awfully lot of important people travelling in and out." Although he declined to make a specific finding either way, the Fayette County Circuit Court noted that: "It may be that the police officers were hostile toward this defendant because of his appearance" (Tr. p. 204, App. at p. 13a). No arrest was made at this time.

After Mrs. Nixon's plane departed, those at the airport terminal left via the access road. Colten was driving a car with two passengers and had room for three or four more. He was directly behind a vehicle operated by Guy Mendez. The Mendez car carried a total of five persons.

At the direction of State Police Officer John R. Miller, the Mendez car pulled over onto the shoulder of the outbound traffic lane, off of the access road. Officer Miller pulled off of the road directly behind the Mendez car, and on seeing this, Colten, who knew Mendez, pulled off of the road and behind Officer Miller's vehicle. Officer Miller found that Mendez had an expired out-of-state license plate and had pulled Mendez over for the purpose of issuing a citation. Officer Miller informed the occupants of Mendez's car that it would have to be towed away.

The Appellant approached Officer Miller and Mr. Mendez to inquire what was happening. There is disputed testimony as to whom he addressed his inquiry, whether to Mendez or to Officer Miller.

The prosecutor attempted to establish that Colten had stood in the road and caused an obstruction to traffic in violation of Subsection (e) of KRS 437.016. However, the evidence against Colten on this was at best unclear and generally showed that there was little traffic and that any blockage was caused by the later arriving police vehicles which parked in the road even though they could have pulled onto the grass on the other side of the access road. Moreover, the trial court rejected that theory as the basis for finding Colten guilty. Nevertheless, the Kentucky Court of Appeals found that Colten was guilty because his presence *caused others* to stay and block a traffic lane. 467 S.W.2d at 376.

Additional State Police and County Police officers arrived, their number being variously estimated at 5 to 10. Additional non-police cars pulled onto the shoulder and the number of people in the vicinity of Mendez's car was variously estimated at 4 to 18 with most of the testimony, including Officer Miller's, making it clear that they were standing in several different groups in various places.

Captain Mayes of the State Police told the people standing around to get into their cars and leave. He testified that he did not specifically see Mr. Colten at this time or specifically ask him to leave. State Police Officer T. H. Brown testified that when he arrived he twice said to Mr. Colten: "Now, this is none of your affair, what's going on here, get back in your car and please move on and clear the road."

Officer Harlowe, the arresting officer, testified that he first saw Colten at the edge of the road, that he asked Colten to

leave, and that when asked to leave, Colten said that he was going to stay around and see what happened. Colten denied making this response. Almost all of the evidence described Colten as speaking quietly to Officer Harlowe. Yet, as the defense witnesses testified, Officer Harlowe said to Colten: "O.K. loudmouth, get back in the car," or words to that effect. Colten's response was to the effect that he would, but that he first wanted to help the people needing rides. On cross examination, Officer Harlowe admitted that he may have addressed Colten as "loudmouth" and that he may have said to him "You've caused enough trouble today." Officer Harlowe, referring to his previously noted personal impressions concerning Colten's appearance, stated that he felt that Colten had "caused enough trouble." Officer Harlowe also admitted that Colten "might have" asked whether he could give a ride to some of the people in the Mendez vehicle. And in his decision the trial judge noted, "I appreciate the fact that he [Colten] may have been waiting to help. . . ." (Tr. p. 206, App. at p. 25a).

Although there is clear evidence that Officer Harlowe took Colten into physical custody, there is also evidence that he never told Colten that he was under arrest and that, in fact, after grabbing Colten he again asked Colten whether he would leave. The evidence is clear that from the time Harlowe ordered Colten to leave through the time he took Colten into physical custody, Colten was constantly well off the road standing on a grassy shoulder area. Upon grabbing Colten, Trooper Harlowe was joined by other police officers and the evidence showed that Mr. Colten was then punched, his hair and moustache pulled by these other police officers, and that he was tossed into a police van. One police officer testified that he heard what was

possibly a scream of pain from Colten. And, the trial court in its decision stated: "I think that the police officers may have also been a little rougher in this instance than may have been necessary. I don't know, I don't find that they did or did not" (Tr. p. 204, App. at p. 13a).

B. The Proceedings.

On March 6th, 1970, Colten was tried without jury in Fayette County Quarterly Court and convicted under KRS 437.016. He was fined $10 plus costs. The closing argument of the defense asserted that the application of the statute to this case was prohibited by the due process and equal protection clauses of the Constitution of the United States. There is no record of these proceedings.

Colten appealed his conviction pursuant to RCr 12.02 and prior to the resulting trial *de novo* in Fayette Circuit Court, Criminal Division, appellant again raised his challenges to KRS 437.016 by a pre-trial motion to dismiss on the grounds that KRS 437.016 is unconstitutionally vague and void for over-breadth under the 14th Amendment. The court denied this motion at the opening of trial (Tr. p. 2, App. at p. 16a).

By consent, the trial *de novo* was without a jury. The Circuit Court found Appellant guilty under subsection (f) of KRS 437.016 (refusing to comply with a lawful order of the police to disperse) and fined him $50 and costs. Appellant's challenges to the constitutionality of KRS 437.016 on its face under the Fourteenth Amendment were renewed on a motion for a directed verdict at the close of the prosecutor's case. They were again renewed in closing

argument and once more upon a motion for a new trial. In addition, appellant challenged, at these times, the application of the statute to the facts of the case on the grounds that such application would violate the Equal Protection clause of the Fourteenth Amendment and would give KRS 437.016 an interpretation which would do violence to the due process clause of the Fourteenth Amendment. Further, after judgment was rendered, appellant duly moved the trial court to correct the penalty imposed so as not to exceed that imposed by the court below. This motion was based on the due process clause of the Fourteenth Amendment. The Circuit Court rejected all of appellant's constitutional objections.

Appellant appealed to the Court of Appeals of Kentucky, asserting as his first assignment of error that "KRS 437.016 is unconstitutionally vague and is so broad as to encompass constitutionally protected activity with the result that the statute is void and cannot be used to convict Lewis Colten."

Further, Appellant argued that KRS 437.016 could not be constitutionally construed to cover the conduct involved in this case. Rejecting these arguments, the Kentucky Court of Appeals ruled that:

> As reasonably construed, the statute does not prohibit the lawful exercise of any constitutional right. We think that the plain meaning of the statute, in requiring that the proscribed conduct be done "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof," is that the specified intent must be the *predominant* intent. Predominance can be determined either (1) from the

> fact that no bona fide intent to exercise a constitutional right appears to have existed or (2) from the fact that the interest to be advanced by the particular exercise of a constitutional right is insignificant in comparison with the inconvenience, annoyance or alarm caused by the exercise. [Emphasis in original.] 467 S.W.2d at 377.

Appellant also contended in the Kentucky Court of Appeals that "The Circuit Court was restricted by RCr 12.06 and due process to imposing a penalty no greater than that imposed by the Quarterly Court." The Kentucky Court of Appeals held that the rationale of *North Carolina* v. *Pearce,* 395 U.S. 711, does not apply to a trial *de novo* appeal. Hence upon a *de novo* appeal the appellant is subject to the maximum penalty under law irrespective of the penalty imposed below.

The Questions Are Substantial

A. The Subjective Balancing Concept of Variable Freedom of Expression and Assembly Used by the Kentucky Court of Appeals in Construing and Applying the Disorderly Conduct Statute Has Substantial Impact on Every Freedom of Assembly and Expression Case in Kentucky and Is Contrary to Established Constitutional Doctrine.

In *Edwards* v. *South Carolina,* 372 U.S. 229, this Court held that freedom of expression is protected against both prior restraint and subsequent punishment "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." 372 U.S. at 237.

In announcing its decision in the case at bar, the Kentucky Court of Appeals enunciated and relied on a quite different doctrinal approach to ascertaining constitutional validity. It ruled that under the disorderly conduct statute, which it found constitutional, conduct is proscribed if either (a) "no bona fide intent to exercise a constitutional right appears to have existed" on the part of the defendant, or (b) if the interest advanced by the defendant "is insignificant in comparison with the inconvenience, annoyance or alarm caused by the exercise" of his constitutional rights. 467 S.W.2d at 377. In explanation, the Kentucky Court said:

> "[W]e do not believe that the evil must be one that rises far above inconvenience, annoyance or alarm where the particular exercise of the right of speech falls far below the level of minimum social value. We think it is a matter of balancing of interests and that where the interest which the individual seeks to advance through exercise of freedom of speech is minuscule in comparison with the public's interest in being protected from the consequences of that exercise, the public's interest should previal even though the harm the public might be exposed to is no more than inconvenience or annoyance" (467 S.W.2d at 377).

The Kentucky court also stated that if "lack of redeeming social value is a basis upon which the right of freedom of speech may be required to yield to the protection of contemporary standards of morality . . . , it would seem that the public's interest in being protected from inconvenience, annoyance or alarm should prevail over any claimed right to utter speech that has no social value" (467 S.W.2d at 377).

This highly subjective constitutional balancing doctrine of variable protection announced by the Kentucky Court of Appeals extends beyond the confines of the facts of the instant case and beyond the reach of the Disorderly Conduct statute. It places a cloud over all freedom of expression and assembly in Kentucky. For example, the doctrine of this case would apply to such other Kentucky criminal statutes as KRS 435.300 (Spreading Slanderous Report); KRS 436.107 (Use of Obscene Language on Telephone); KRS 436.150 (Profane Cursing or Swearing); 436.520 (Vagrancy); 436.530 (Peace Officer's Duty to Disperse Vagrants); 437.014 (Failure to Disperse); 437.015 (Unlawful Assembly); 437.017 (Loitering); and 437.015 (Inciting Race Prejudice), rendering all of these statutes, and possibly others, constitutionally void for overbreadth. But until such declaration of infirmity is authoritatively made in this case, the doctrine of this case as applied to all of these statutes will burden the exercise of basic constitutional freedom.

The rule of the Kentucky Court in the instant case is contrary to established constitutional policy. On the face of its own opinion, the Kentucky Court of Appeals has reshaped this Court's holding in *Edwards* v. *South Carolina*. Moreover, its decision illustrates the very sort of dangers from subjective, variable approaches to basic liberties which this Court has tried to foreclose. For example, this Court in *Coates* v. *Cincinnati*, 29 L. ed.2d 214, warned that a state cannot constitutionally restrict expression or assembly "through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed." The Kentucky

Court of Appeals, applying its version of the constitutional standard, however, found a violation of law in this case based on its imputation of intent on the part of appellant to "irritate the police by his presence, and by efforts at interruption." In other words, while this Court looks to the substantiality and immediacy of overt dangers resulting from the exercise of constitutional rights (*Brandenburg v. Ohio*, 395 U.S. 444; *Cohen* v. *California*, 29 L. ed.2d 214), the Kentucky Court's constitutional test is responsive to the policeman's emotional reaction to the defendant and to the Kentucky high court's own manifest antipathy toward him.[1]

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[1] Although the record shows that Colten spoke quietly at all times, Officer Harlowe admitted that he might have addressed Appellant as "loudmouth." There was considerable testimony that the policeman did use this term and in appellant's brief to the Kentucky Court of Appeals, counsel called attention to this fact in support of the contention that Colten was arrested in violation of Equal Protection because of his appearance and not because of his conduct. Responding to this argument, the Court's opinion states: "Colten complains of the fact that the arresting officer called him a 'loudmouth' when making the arrest, but we think this complaint comes with little grace from a man who argues in his brief the right of a citizen to call policemen *and their wives* 'pigs.' The evidence warrants the conclusion that Colten was in fact a 'loudmouth,' which fact tends to show an *absence* of discrimination in the enforcement of the statute against him, because 'loudmouths' are the class of persons who ordinarily would commit violations of the statute." [Emphasis in original.] (467 S.W.2d at 379.) (The reference to calling policemen "pigs" originated in appellant's brief to the Kentucky Court where appellant's counsel, to illustrate the statute's overbreadth, employed a hypothetical involving a fictitious person who uses this term in giving a speech to a gathering of policemen and their wives.)

B. The Impact of This Decision Is Substantial and Far Ranging Because It Involves the Constitutional Construction and Application of a Statute Which Is Frequently Resorted to as a Catch-All in Dealing With By-Standers and "Undesirables."

It is well recognized that a broadly construed disorderly conduct statute readily becomes a tool for police abuse of constitutional rights. As noted by the President's Commission on Law Enforcement and Administration of Justice, such statutes can be used to justify almost any exercise of law enforcement authority.[2] Yet the Kentucky Court of Appeals has by the instant decision given its approval to application of the disorderly conduct statute to someone who fails to disperse when ordered by the police to leave the area in which a citation is issued unless the defendant can satisfy the court that he had "some bona fide purpose other than merely to assemble" (467 S.W.2d at 378). The approach of the Kentucky Court on this aspect of the case is contrary to that of the New York court in *People* v. *Stein,* 278 N.Y.S.2d 832 (1967), and in conflict with the Supreme Court's reasoning in *Thompson v. Louisville, supra* at 206; *Coates* v. *Cincinnati, supra; Wright* v. *Georgia,* 373 U.S. 284, 291-292 (1963); *Shuttlesworth* v. *Birmingham,* 382 U.S. 87; *Shuttlesworth*

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[2] "Minor crime statutes are frequently misused. They are employed as a means of clearing undesirables or unsightly persons from the street or driving them out of town, aiding the police in detaining a suspected person during an investigation of a more serious crime, and regulating street activity in slum neighborhoods." President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: The Police at p. 187 (1967).

"Most statutes which are used to regulate street conduct are so broad that almost unlimited discretion is given to the police officer to arrest persons on the street or, as with a failure-to-move-on statute, to regulate conduct by the threat of arrest." *Id.* at 188.

v. *Birmingham,* 394 U.S. 147. (See also the comments to the Proposed Model Penal Code Art. 250 at pp. 14-17 of Tent. Draft No. 13 (1961).)

In Kentucky, 13.4 percent of all non-traffic arrests in 1970 were for disorderly conduct. Only arrests for drunkenness surpassed disorderly conduct arrests in number. When offenses involving excessive use of alcohol are eliminated, disorderly conduct accounted for 27.5 percent of all non-traffic arrests in Kentucky during 1970.[3]

The impact of the Kentucky high court's constitutional interpretation of the Kentucky disorderly conduct statute, therefore, by giving wide discretion to police authorities and by placing upon the defendant a burden of demonstrating the urgency of his exercise of constitutional rights, has shaped the statute into a likely tool for police abuse.

The facts of the instant case serve as a good example of how KRS 437.016 facilitates such encroachments upon constitutional freedom.

The manifest truth is that the appellant was not arrested for disorderly conduct. Disorderly conduct entered the picture later, as a *post hoc* justification for the arrest. He was arrested because some policemen after a long tense day protecting the First Lady, were unable to resist the temptation first to order about this hippie-demonstrator type, then to grab him, and finally to rough him up. Having lost their professional composure, the police attempted to mask their error with a charge. The disorderly conduct statute, being such a broad and sweeping provision, was a logical choice. By rejecting appellant's constitu-

[3] Commonwealth of Kentucky, Uniform Crime Reports: 1970 at p. 30, Table 7 (1971).

tional challenges to such application of the statute, the Kentucky high court has fallen into the error described by this Court in *Coates* v. *Cincinnati, supra,* of creating "an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle or their physical appearance is resented by a majority of their fellow citizens." 29 L. Ed.2d at 218. That error poses a most substantial threat to the constitutional liberties of persons living in, or passing through, Kentucky. It should be reviewed by this Court.

C. This Appeal Is Substantial Because the Challenged Statute Bears Great Similarity to the Disorderly Conduct Statute in the Proposed Model Penal Code, the Proposed New Federal Criminal Code and the New York Act.

The substantiality of the constitutional issues raised by the Kentucky high court's application of the Disorderly Conduct statute in this case is heightened by the fact that the language of the Kentucky statute is very similar to New York's Disorderly Conduct Statute (N.Y. Penal Law §240.20) and to the Disorderly Conduct provisions of the Proposed Model Penal Code (Article 250) and the Proposed New Federal Criminal Code (§1861). Although the Kentucky court's decision conflicts with the New York decisions on the application of the Disorderly Conduct statute,[4] and flies in the face of commentaries accompanying both the proposed Model act and the proposed new federal revisions,[5] there is danger that the Kentucky deci-

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[4] See *People* v. *Stein,* 278 N.Y.S.2d 832 (1967).

[5] Proposed Model Penal Code, Tent. Draft No. 13, Comments, at pp. 14-17 (1961); Nat'l Comm'n on Reform of Fed. Crim. Laws, Final Report at p. 270 (1971).

sion will have persuasive impact upon future adjudication under the disorderly conduct statutes of other states, especially those based on the proposed Model and federal acts.

D. There Is a Conflict Among the Courts Respecting the Application of *North Carolina* v. *Pearce* to Trial *De Novo* Appeals From Lower Criminal Courts and This Case Presents the Same Basic Question as *Rice* v. *North Carolina* in Which Certiorari Has Been Granted.

The Court of Appeals for the Fourth Circuit, the United States District Court for the Eastern District of North Carolina, the Supreme Courts of Arizona, Indiana, and Hawaii, and the Maryland Court of Special Appeals have all held that the reasoning of *North Carolina* v. *Pearce*, 395 U.S. 711, applies to trial *de novo* appeals from lower criminal court convictions.[6] On the other hand, the Court of Appeals for the First Circuit, and the Michigan, North Carolina and Virginia Supreme Courts,[7] as well as the Kentucky Court of Appeals, have rejected this interpretation of *Pearce*. It is not surprising, therefore, that the Court recently granted certiorari on this issue in *Rice* v. *North Carolina*, No. 70-77. And, inasmuch as the *Rice* case involves an appellate decision to the effect that

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[6] *Wood* v. *Ross*, 434 F.2d 297 (4th Cir. 1970), cert. granted sub nom. *Rice* v. *North Carolina*, 39 USLW 3437 (Apr. 5, 1971); *Torrence* v. *Henry*, 304 F. Supp. 725 (E.D. N.C. 1969); *McDougald* v. *Ivester*, 321 F. Supp. 943 (E.D. N.C. 1971); *Bronstein* v. *Superior Court*, 475 P.2d 235 (1970); *Eldridge* v. *Indiana*, 267 N.E.2d 48 (Ind. Sup. Ct. 1971); *Hawaii* v. *Shak*, 466 P.2d 420 (1970); *Cherry* v. *State*, 264 A.2d 887 (Md. Ct. of Spec. App. 1970).

[7] *Lemieux* v. *Robbins*, 414 F.2d 353 (1st Cir. 1969), cert. denied 397 U.S. 1017 (1970); *State* v. *Spencer*, 173 S.E.2d 765; *State* v. *Sparrow*, 173 S.E.2d 897 (N.C. 1970); *Michigan* v. *Olarz*, 170 N.W. 2d 842 (1969); *Evans* v. *Richmond*, 171 S.E.2d 247 (Va. 1969).

Pearce is applicable to trial *de novo* appeals, and the instant case involves an appellate decision rejecting that view, the instant case presents an appropriate companion to *Rice* on the application of *Pearce*.

E. Because the Kentucky Court of Appeals Has Acknowledged That Its Lower Criminal Courts Do Not Afford Full Constitutional Protections, the Chilling of the Right to Appeal From Those Courts Creates an Especially Serious Deprivation of Constitutional Rights.

In the course of its opinion in the instant case, the Kentucky Court of Appeals stated: "Under our system of justice the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms." Thus, as a result of the decision in the instant case, a defendant in a police or quarterly court is faced with accepting a penalty imposed by that court in a proceeding which does not afford due process, or as the price of securing due process, placing himself in jeopardy of suffering an even greater penalty.

In the instant case the defendant was able to appeal from substantive constitutional errors (involving the validity of the disorderly conduct statute on its face and as applied) only by placing himself in jeopardy of an even greater penalty. And a fivefold increase in that penalty in fact resulted. The extent of that price for appeal from substantive constitutional error was more dramatically illustrated in *Bell* v. *Commonwealth*, —— S.W.2d —— (Ky. 1971), pet. for cert. filed June 1, 1971, where the defendant appealed to the Fayette Circuit Court from a one dollar fine for peacefully submitting to arrest in protest against a curfew. There the defendant was sentenced to almost six months' imprisonment and a $500 fine in the second trial.

As a result of the Fayette Circuit's imposition of increased penalties in trial *de novo* appeals from the lower criminal courts, defendants have in fact been deterred from pursuing their right to full constitutional protection. For example, App. pp. 21a-22a contains the opinion of the Fayette Circuit Court dismissing the appeal from the Quarterly Court's imposition of a $50 fine in a disorderly conduct case. As the court's opinion reveals, that motion was made by the appellant-defendant on the basis that strong antipathy toward college students posed the danger of a more severe penalty resulting from exercising the right of appeal. Acknowledging that danger, and the right to withdraw from an appeal, the Fayette Court granted the motion. Although there is no record to substantiate this fact, as counsel of record in that case, one of the undersigned attorneys (Alvin L. Goldman) can assure the Court that that appeal had been initiated because of meritorious claims of inadequate opportunity to prepare the defense, *and* of other errors of statutory and constitutional law. Thus, for fear of the possible substantial increase in penalty, the defendant there suffered the imposition of a criminal penalty in a proceeding in which he was not afforded his full constitutional protections.

Though the defendant was only fined in the instant case, in the next case he might suffer 6 months' imprisonment from the lower trial court rather than chance an unsuccessful appellate challenge based on constitutional error because to chance it could result in 12 months' imprisonment.[8] The constitutional deficiency of such a possibility is, indeed, most real and substantial.

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[8] KRS 25.010 gives Quarterly Courts jurisdiction in misdemeanor cases involving penalties of up to $500 fine and up to twelve months' imprisonment. KRS 26.010 gives Police Courts the same scope of criminal jurisdiction.

CONCLUSION

For the foregoing reasons, jurisdiction should be noted.

Respectfully submitted,

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September 20, 1971

APPENDIX

Opinion of the Kentucky Court of Appeals

[467 S.W.2d 374]

LEWIS COLTEN,

Appellant,

—v.—

COMMONWEALTH OF KENTUCKY,

Appellee.

Court of Appeals of Kentucky.

May 21, 1971.

CULLEN, Commissioner.

Lewis Colten was convicted in the Fayette Quarterly Court of a violation of the Kentucky disorderly conduct statute, KRS 437.016, and was fined $10. He appealed to the Fayette Circuit Court where he was tried de novo (without a jury, it having been waived) and again was found guilty, but the fine was increased to $50. Colten appeals to this court from the circuit court judgment.

The circuit court found Colten guilty of violating paragraph (f) of KRS 437.016 (1). That paragraph, with an introductory phrase designed to be read with it, is as follows:

> "A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> * * * * *

"(f) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse * * * *"

Colten's two leading contentions are (1) that the statute is unconstitutional and (2) that even if the statute be held constitutional the Commonwealth failed to prove the elements of the offense proscribed by the statute. We shall give consideration first to the question of the sufficiency of the proof, because to do so enables the opinion to be commenced with a full statement of the facts and because we think that the question of constitutionality should be considered in the light of the facts of this case, not in the abstract. In measuring the sufficiency of the proof we shall of course view the evidence most favorably to the Commonwealth, and in stating the facts we shall state only the Commonwealth's version where there was probative evidence to support that version. Pearson v. Commonwealth, 295 Ky. 616, 175 S.W.2d 33; United States v. Smith, 6 Cir., 399 F.2d 896.

On March 3, 1970, Mrs. Richard M. Nixon (the First Lady) was in Lexington, Kentucky, to make a public appearance. When the appearance was concluded she was driven to the local airport to make her departure from Lexington. A substantial crowd was in attendance at the airport. Among those present were Colten and some 15 to 20 other college students who had attended in a group for the purpose of conducting a demonstration to protest against the program which Mrs. Nixon had advocated and to show support for the group's gubernatorial candidate. Colten was a leader and spokesman for the group.

As Mrs. Nixon's plane was preparing to depart the group engaged in some form of demonstration on the lawn of

the airport, which one of the Commonwealth's witnesses described as "a whooping and hollering party." The police who were present in strength by reason of the importance of the visitor and the crowd her presence had gathered, did not disturb the demonstration.

After Mrs. Nixon's plane had departed, the crowd at the airport began to leave. Colten's group got into their automobiles and formed a procession of some six to ten cars proceeding along the access road toward the main highway. A state police officer, John Miller, had observed that one of the first cars in the procession carried an expired Louisiana license plate, and he directed the driver, one Mendez, to pull his car off the road onto the right shoulder. When Mendez complied, Colten and the other members of the procession also pulled their cars off the road onto the shoulder. They all got out of their cars and Colten pursued inquiries as to the cause of the stopping of the Mendez car, while the others in the group, some 15 in number, stood around *in the roadway*.

Colten approached Officer Miller and asked why he had stopped the Mendez car. Miller told him that the car bore expired license plates, that he was not arresting Mendez but was giving him a citation, and that the car would be towed in to the city. Colten continued to endeavor to engage Miller in conversation, and to offer advice to Mendez, until Miller got into his patrol car with Mendez and rolled up the windows to shut out Colten's interference. Colten continued to remain in the area of the patrol car. His testimony was that he wanted to counsel Mendez as to a possible ground for relief from the citation and he wanted to arrange for passage to Lexington for Mendez and the latter's passengers. The evidence warranted the inference,

however, that Colten's real intent was simply to aggravate, harass, annoy and inconvenience the police, for no purpose other than the pleasure of aggravation, harassment, annoyance and inconvenience. He had been told by Officer Miller the cause of the stopping of the Mendez car, that Mendez was not being arrested, but that the car would be towed in. The fact that the license plate was expired was obvious. There was no occasion for further discussion or advice. Arrangements could have been made promptly for passage for the passengers in the Mendez car, who were under no detention. A simple word to Mendez that someone would wait down the road for him would have taken care of passage for Mendez. Instead, Colten, a leader of a group who had no interest at all in remaining at the scene, by his continued presence encouraged and led the others to stay, blocking a traffic lane and causing inconvenience and annoyance to other travelers. The presence of the Colten group caused other police officers to stop. A state police captain asked the group four or five times to leave. Another officer twice asked Colten to leave. A third officer, Harlowe, three times asked Colten to leave. Each time Colten offered some excuse. Finally, after the third request was not complied with, Officer Harlowe arrested Colten for disorderly conduct.

Arguing the insufficiency of the evidence to establish a violation of the statute, counsel for Colten says first that there was no proof of a lawful order to disperse; no proof of any need or purpose for an order to disperse. In making this argument counsel treats the situation as if Colten were a lone individual causing no trouble, not blocking traffic, merely trying to be of help to his friends in the Mendez car. The evidence, however, presents an entirely different picture of the situation, with Colten as the leader of a group

of some 15 persons who created inconvenience and annoyance by standing in the roadway, parking their cars so as to require police to stop their patrol cars on the roadway, forming an assembly for [redacted] purpose other than to aggravate, annoy, harass and inconvenience. Perhaps the inconvenience and annoyance were not great, but their extent was substantial when measured against the complete absence of any legitimate objective for the assembly.

Counsel next says that there was no proof of a refusal to disperse. We think the evidence, outlined above, fully warranted the inference that Colten's statements that he would leave *after* he had made arrangements for passage for the people in the Mendez car were simply disguised *refusals* to leave.

Counsel further says that there was no proof of an intent to cause public inconvenience or annoyance. As hereinbefore noted, we are of the opinion that the intent was clearly inferable from Colten's actions in continuing to remain at the scene, with his group, after any legitimate excuse for so doing had ceased to exist. The group was in fact causing inconvenience and annoyance, and it is reasonable to infer that this was the sole intent.

We come now to the question of constitutionality of the statute. In our approach to that question we shall be concerned primarily with the statute as applied to the facts of this case, not as it might be applied in some imaginary or hypothetical situation. See O'Leary v. Commonwealth, Ky., 441 S.W.2d 150.

Appellant asserts that the statute is unconstitutional because of (1) overbreadth and (2) vagueness. Overbreadth is claimed to exist in that the statute employs means that stifle or chill the exercise of constitutionally protected free-

doms when the end could be more narrowly achieved. See Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231; Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444; Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510. Vagueness is asserted in that the statute is drawn in language so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. See Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322. It is our opinion, however, that the statute, *reasonably construed*, is not faulty in either of the claimed respects. Cf. O'Leary v. Commonwealth, Ky., 441 S.W.2d 150.

As reasonably construed, the statute does not prohibit the lawful exercise of any constitutional right. We think that the plain meaning of the statute, in requiring that the proscribed conduct be done "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof," is that the specified intent must be the *predominant* intent. Predominance can be determined either (1) from the fact that no bona fide intent to exercise a constitutional right appears to have existed or (2) from the fact that the interest to be advanced by the particular exercise of a constitutional right is insignificant in comparison with the inconvenience, annoyance or alarm caused by the exercise. The Supreme Court, in Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697, recognized that the right of freedom of speech may be required to yield where its exercise is likely to produce a clear and present danger of a serious substantive evil, and although the Court classified such an evil as one "that rises far above public inconvenience, annoyance, or unrest" we do not believe that the evil must be one that rises far above inconvenience, an-

noyance or alarm where the particular exercise of the right of speech falls far below the level of minimum social value. We think it is a matter of balancing of interests and that where the interest which the individual seeks to advance through exercise of freedom of speech is minuscule in comparison with the public's interest in being protected from the consequences of that exercise, the public's interest should prevail even though the harm the public might be exposed to is no more than inconvenience or annoyance. For example, if a person were to arise in the audience at a symphony concert and proceed in a loud voice to state at length his belief that Leghorn chickens are prettier than Plymouth Rocks, or some similar inanity, reasonable minds surely would agree that the interest of the public against being so annoyed would far outweigh any possible interest of the speaker to be served by that particular exercise of the function of speech.

If the lack of redeeming social value is a basis upon which the right of freedom of speech may be required to yield to the protection of contemporary standards of morality (see A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Com. of Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1), it would seem that the public's interest in being protected from inconvenience, annoyance or alarm should prevail over any claimed right to utter speech that has no social value.

We see no reason to engage in the making of fine distinctions between "speech" and "nonspeech" elements as was done in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672. Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697, recognizes that pure speech may be suppressed in the public interest if the danger to the

public is great enough. And it is axiomatic that private rights must yield to a reasonable exercise of the police power. 16 Am.Jur.2d, Constitutional Law, secs. 286, 287, pp. 556 to 560; Bowling v. City of Somerset, Ky., 333 S.W.2d 769.

In the language of Rowan v. United States Post Office, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736, we think it is a matter of "Weighing the highly important right to communicate * * * against the very basic right to be free from sights, sounds, and tangible matter we do not want * * * ." The government's "important or substantial governmental interest," required by *O'Brien* to exist as a basis for regulation in the area of First Amendment freedoms, is relative to the importance or substantiality of the particular purported exercise of one of those freedoms.

We subscribe fully to these expressions in Cox v. Louisiana, 379 U.S. 536 at 554, 85 S.Ct. 453, at 464, 13 L.Ed.2d 471:

> " * * * The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil rights which, in other circumstances, would be entitled to protection. * * * ".

In the instant case the evidence warranted the conclusion that Colten was not undertaking to exercise any constitutionally protected freedom. He was not exercising the right of freedom of speech because that right is concerned with expression of thought or dissemination of idea. See Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L. ed.2d 205. Colten was not seeking to express a thought to any listener or to disseminate any idea. He simply was trying to irritate the police by his presence and by efforts at interruption. Nor was he exercising the right of peaceable assembly, because that right, we believe, contemplates that the assembly is for some bona fide purpose other than merely to assemble, and Colten's group appears to have had no purpose other than to cause inconvenience and annoyance. So the statute as applied here did not chill or stifle the exercise of any constitutional right.

As concerns the argument of vagueness, we think our holding in O'Leary v. Commonwealth, Ky., 441 S.W.2d 150, is fully applicable. We believe that citizens who desire to obey the statute will have no difficulty in understanding it, relying, as they are entitled to, that the statute will be construed sensibly and reasonably. It is true that the statute does not attain idealistic perfection in preciseness, but it is fully as precise as some of the language of the Bill of Rights. We do conceive that the defining of prohibited conduct must be more precise than the defining of a right of conduct. To illustrate: If "peaceably" is a sufficiently precise word in the First Amendment's guarantee of the right of assembly, should "nonpeaceably" be considered too vague in a statute describing the kind of assembly that is prohibited?

It is our conclusion that the statute is not void for overbreadth or vagueness. In this view we are supported by the

decision of the three-judge federal district court in Muskat v. Goff, Civ. No. 6532, March 26, 1970 (W.D.Ky.).

The appellant makes a third contention, that the evidence shows the discrimination in the enforcement of the disorderly conduct statute, in that Colten was arrested solely because he wore a beard, long hair and "hippie" clothes, and because he and his group had demonstrated on the airport lawn. In our opinion the evidence does not require that conclusion. In view of the fact that Colten and his group were permitted to make their demonstration without interference, and in view of the fact that the police quietly and courteously asked Colten ten times to leave, before arresting him, we think a finding of discrimination in making the arrest hardly would be warranted, much less required. Colten complains of the fact that the arresting officer called him a "loudmouth" when making the arrest, but we think this complaint comes with little grace from a man who argues in his brief the right of a citizen to call policemen *and their wives* "pigs." The evidence warrants the conclusion that Colten was in fact a "loudmouth," which fact tends to show an *absence* of discrimination in the enforcement of the statute against him, because "loudmouths" are the class of persons who ordinarily would commit violations of the statute.

The appellant's final contention is that the imposition by the circuit court, on appeal from the quarterly court, of a fine higher than that imposed by the quarterly court, constituted a violation of due process, under the rationale of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2089, 23 L.Ed.2d 656. For the reasons stated by this court in Brooks v. Commonwealth, Ky., 447 S.W.2d 614, and for additional reasons hereinafter stated, we think the contention is not

valid. *Pearce* stands for the proposition that a defendant's right, by appeal, to obtain relief from *errors* upon a trial, cannot be impaired or fettered by the fear of receiving a greater penalty on a new trial, by way of retaliation for his having taken the appeal. Under our system of justice the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses. The convenience is for the benefit of the accused as well as of the Commonwealth. An accused who wants a full-blown trial, in a court of general jurisdiction designed to give full protection to his rights, may appeal to the circuit court and obtain a trial de novo. If he so desires, he need not undergo the bother of a trial in the inferior court, for he can plead guilty there and still appeal to the circuit court. Brown v. Hoblitzell, Ky., 307 S.W.2d 739. The question of whether there was *error* in the quarterly court is irrelevant. The "appeal" to the circuit court from the quarterly court is not an appeal in the sense of *Pearce*. It simply is an election to have the case determined by a court of general jurisdiction rather than by a court of convenience. We do not believe that *Pearce* intends to say that a state cannot put some price on the accused's privilege of a choice of courts as distinguished from pricing the right to obtain a fair trial in one court which the state fixes as the sole forum.

The judgment is affirmed.

All concur.

Fayette Circuit Court's Decision

The Court: It's at moments such as this that I can appreciate the responsibility that persons serving on the jury have. You hear excellent arguments by counsel on both sides, you've had an opportunity to see and observe the witnesses and listen to their testimony, and then you have to make your decision, and I appreciate the fact that it's not always a clear cut type of a case and gives you some concern.

In a case such as this, with a young defendant, young witnesses with him from the university, a young defendant dressing differently than what the great majority of society would believe in, maybe belonging to organizations that a lot of people would frown upon, engaging in activities that the majority of the people would not condone or believe in, the Court finds itself in the position of attempting to lean over backwards to let these young people know that they are entitled to a fair hearing, that they are to be judged in this case not on the basis of their appearance, not on the basis of the demonstration that may have taken there close to the airplane, not on the basis of organizations that they belong to, but upon the basis of the facts surrounding this particular case.

Yet in leaning over backwards to let these young people know that the courts do try to be fair, we have the other concern in that policemen in making arrests are sometimes interfered with in making that arrest, that on occasion they have been interfered with to the extent that recently in California two or three policemen lost their lives when they attempted to effect an arrest.

I'm not saying that in this instance there was any clear immediate danger to the police officers, but nonetheless I

can appreciate their concern when people start gathering around at the time they are making an arrest and I appreciate the fact that they may have been somewhat apprehensive on this day in question. I am sure that they heard many things and maybe a lot of this was strictly rumor with no basis in fact, but nonetheless, I am sure they were somewhat concerned.

I'm not going to again rule upon the constitutionality of the statute. I think we heard ample arguments on both sides, so it comes down to the question and the single question, was there disorderly conduct by the defendant on this occasion.

We heard from the police officers that a group ranging from five up through 15 people were gathered around at the time Officer Miller was attempting to issue a citation, that several cars had parked on the shoulder of the highway. You heard Trooper Miller testify that he left Mendez' automobile and went back to his car and rolled up the windows in order not to be interfered with by this particular defendant. You heard the other officers testify that on two or three occasions they asked this defendant to leave.

It may be that the police officers were hostile toward this defendant because of his appearance, he may have been physically offensive but I don't think that's a violation of the law, but I think that the police officers may have also been a little rougher in this instance than may have been necessary. I don't know, I don't find that they did or did not. I've heard the testimony, but I think the most crucial part of the testimony in this case is that Officer Harlowe, in making the arrest—this is from the defendant's own witnesses, even after he had him by the arm, again asked him if he was going to leave, and it seems inconceivable

to me that he would have again asked him if he was going to leave if he had no desire that he do so.

Miss Geis' testimony that there were up to maybe 15 people gathered around and the officers asked them to leave, and the fact that the police officers did park there and block the road, while it may not have been any of the automobiles belonging to the people associated with the defendant, nonetheless, it was their actions which would have brought on the blockage of this road.

I think on the basis of the testimony, and trying to weigh it completely, and listen carefully to all of it, that the Court will have to find that the defendant is guilty of the offense of disorderly conduct in his failure to leave the premises. I think the police do have a right to get a crowd back away from them at the time they are effecting an arrest. I'm not inclined to believe that the reason they want this crowd away is the fact that they want to commit brutality. The Court is aware that on occasion there is brutality by the police, but I think this is the exception rather than the rule. I don't believe this is the reason. I believe it is for the protection of the officers and the protection of the person they are attempting to arrest.

I think the evidence, as I say, is sufficient to find the defendant guilty of the disorderly conduct statute, which says that "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating the risk thereof," he obstructs vehicular or pedestrian traffic, or "congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse."

I think that the last one is the category in which the Court will find he is guilty of the offense of disorderly conduct. If he had wanted to help these people, they could

have remained in their cars, and after the officer had finished issuing the citation the people could have gotten out and come back and gotten into these other cars.

I appreciate the fact that he may have been wanting to help, but by the same token when the police ask him to leave and he had no lawful purpose for remaining, he should have returned to his automobile.

I find him guilty of this offense, and fix his fine at $50.00.

Fayette Circuit Court Ruling on Pre-trial Motions

The Court: Mr. Goldman, as I indicated to you the other day, I was inclined to rule against your motion to dismiss on constitutional grounds for the reasons stated the other day but advised you I would withhold my decision until such time as the three judge panel opinion from Louisville was submitted to me. That wasn't overly enlightening in that they stated no reasons that I could find for their decision, they just simply overruled it, said it was not unconstitutional.

I assume you were not able to get hold of a copy of the opinion that we were discussing either out of Baltimore or New York?

Mr. Goldman: It has not yet arrived, Your Honor.

The Court: All right. As I indicated to you, I am rather hesitant, unless it's shown on its face that the statute is unconstitutional, I am hesitant about declaring it unconstitutional. As indicated to you the other day, not only that, but I am also of the opinion that in abolishing the breach of peace statute and in enacting the statute, the legislature was attempting to more specifically define and describe those instances which would constitute disorderly conduct. I don't know that you can go much further in defining disorderly conduct. It may be possible that the Court of Appeals of Kentucky will find that it is unconstitutional, but I think I prefer to let them do so, so let your motion to dismiss on the basis of the constitutionality be overruled.

Notice of Appeal to the Supreme Court of the United States

COURT OF APPEALS
COMMONWEALTH OF KENTUCKY

File No. F-167-70

LEWIS COLTEN,

Appellant,

v.

COMMONWEALTH OF KENTUCKY,

Appellee.

NOTICE IS HEREBY GIVEN that Lewis Colten, the above-named appellant, hereby appeals to the Supreme Court of the United States from the final judgment, order and mandate of the Court of Appeals of Kentucky, entered on June 22, 1971, affirming the judgment of conviction issued herein on May 21, 1971.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

ALVIN L. GOLDMAN
Counsel for Appellant
1692 Williamsburg Road
Lexington, Kentucky 40504
257-2825

Mandate of the Kentucky Court of Appeals

COURT OF APPEALS
COMMONWEALTH OF KENTUCKY

SPRING TERM—May 21, 1971

LEWIS COLTEN

vs.

COMMONWEALTH OF KENTUCKY

Appeal from a judgment of the Fayette Circuit Court.

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A copy—Attest:

DICK VERMILLION, C. C. A.
By JOHN C. SCOTT, D.C.

Issued June 22, 1971

Kentucky Disorderly Conduct Statute

437.016 *"Disorderly conduct" defined; penalty.*

(1) A person is quilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(a) Engages in fighting or in violent, tumultuous or threatening behavior; or

(b) Makes unreasonable noise; or

(c) In a public place uses abusive or obscene language, or makes an obscene gesture; or

(d) Without lawful authority, disturbs any lawful assembly or meeting of persons; or

(e) Obstructs vehicular or pedestrian traffic; or

(f) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or

(g) Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose.

(2) Disorderly conduct is punishable by imprisonment in jail for not more than six months, by a fine of not more than $500, or both.

Kentucky Rules of Criminal Procedure

12.02 *Manner of taking.*

(1) An appeal to the circuit court is taken by filing with the clerk thereof a certified copy of the judgment and the amount of costs, and causing to be executed before the clerk a bond to the effect that the defendant will pay the costs of the appeal and perform the judgment which may be rendered against him on the appeal; whereupon, the clerk shall issue an order to the judge or the justice rendering the judgment, to stay proceedings thereon, and to transmit to the office of said clerk all the original papers in the prosecution.

(2) The applicable provisions governing bail shall apply to the bond provided for in subsection (1).

(3) After the service of the order to stay proceedings, no execution shall be issued from the inferior court, and any officer on whom the order is served shall return the execution in his hands as suspended by appeal.

12.06 *Schedule and manner of trial; judgment.*

Appeals taken to the circuit court shall be docketed by the clerk thereof as a regular criminal prosecution and shall be tried anew, as if no judgment had been rendered, and the judgment shall be considered as affirmed to the extent of the punishment, if any, adjudged against the defendant in the circuit court, and thereupon he shall be adjudged to pay the costs of the appeal. If an appeal taken to the circuit court be dismissed, the judgment of the court from which it was taken shall stand affirmed and the costs of the appeal shall be paid by the party whose appeal is dismissed.

Order of the Kentucky Court of Appeals

FAYETTE CIRCUIT COURT

SECOND DIVISION

Oct. 15, 1970

COMMONWEALTH OF KENTUCKY,

Plaintiff,

—v.—

STEVE BRIGHT,

Defendant.

(Appeal)

The defendant was found guilty in the Fayette Quarterly Court on a charge of disorderly conduct and fined $50.00 and costs. He thereafter filed an appeal with this Court. He has now filed a motion requesting that his appeal be dismissed. It would appear from the memorandum which was submitted in support of his motion to dismiss that the defendant is alleging that "* * * strong antipathy toward college students exist in this community. * * * this state of mind appears to be statewide—perhaps even nationwide." Further he makes reference to another case which was recently tried in this Court growing out of the same incidences which occurred at the University of Kentucky in May of this year and in which case the defendant received a substantially increased sentence than that imposed in the lower court.

The Commonwealth Attorney has advised the Court that he does not wish to oppose the defendant's motion to dismiss.

While the defendant may be correct in his assumption that the citizens of this community have a hostile attitude toward students who would attempt to disrupt the university, it may be that this hostility has been earned, and it is conceivable that a jury composed of citizens of this community might impose a more severe sentence than that imposed in the court below. Nonetheless, the Court after having reviewed the law submitted by the defendant and having conducted its own research of the law is of the opinion that the defendant has a right to dismiss his appeal and that he cannot be forced into a new trial if he does not desire to continue his appeal. For that reason the defendant's motion to have his appeal dismissed be and the same is hereby granted.

This October 14, 1970.

/s/ N. Mitchell Meade
Judge

A Copy

Attest: .....
Fayette Circuit Court

Copies to:

Commonwealth Attorney

Alvin L. Goldman
1692 Williamsburg Road
Lexington, Kentucky
Attorney for Defendant

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-404

LEWIS COLTEN ..... APPELLANT

Vs.

COMMONWEALTH OF KENTUCKY ..... APPELLEE
ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS AND/OR AFFIRM AND BRIEF IN SUPPORT

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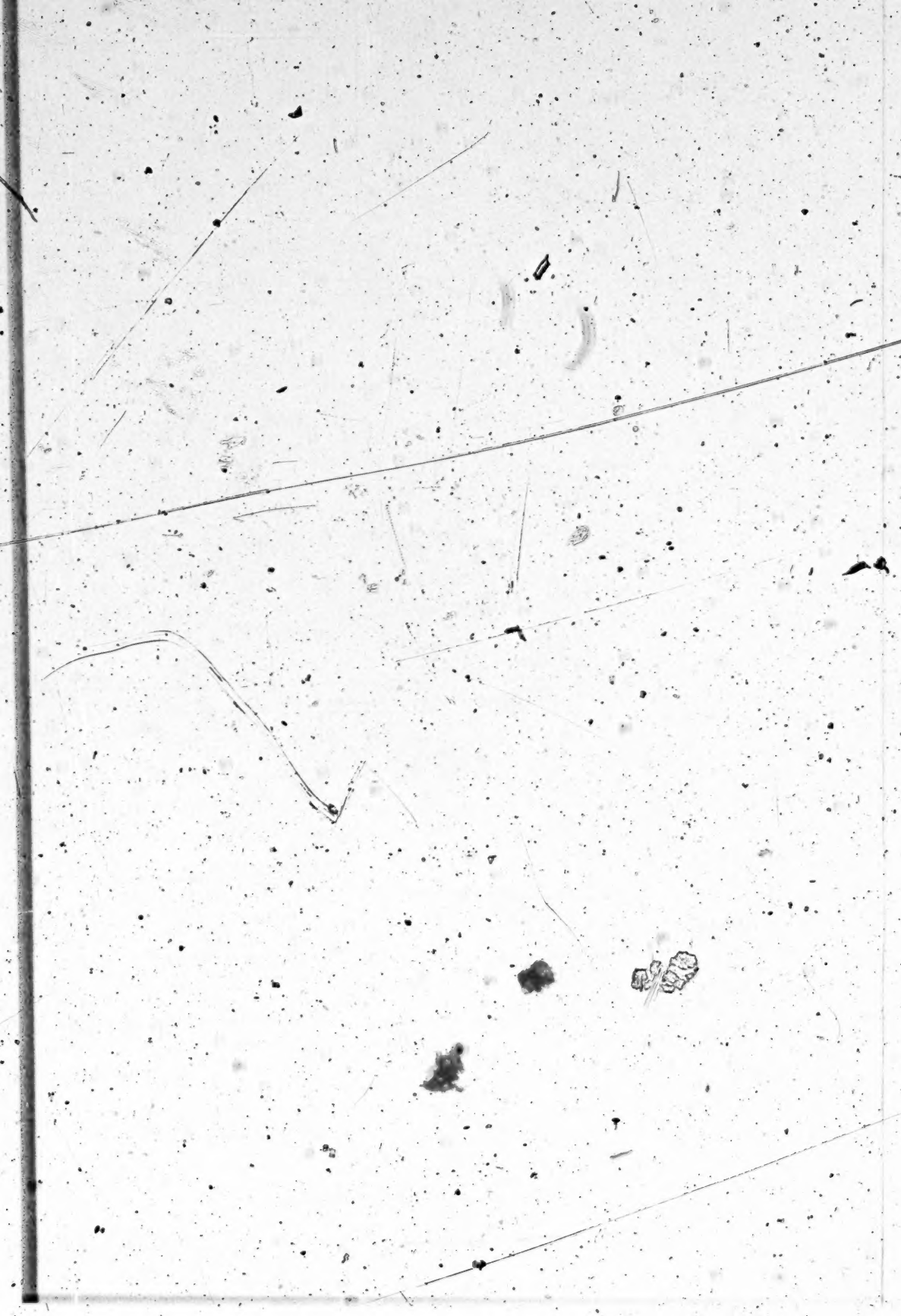

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-404

LEWIS COLTEN ---------- *Appellant*

Vs.

COMMONWEALTH OF KENTUCKY ---------- *Appellee*

MOTION TO DISMISS AND/OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee moves that this appeal be dismissed, or in the alternative, that the final judgment of the Court of Appeals of Kentucky be affirmed, and as grounds for this Motion states:

1. The questions presented by appellant are not substantial Federal questions under the circumstances of this case. Appellant was not engaging in protected conduct and therefore may not rely on the theory of vagueness and overbreadth.

2. Brief in support of this Motion is filed herewith pursuant to Rule 35.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 71-404, October Term, 1971

LEWIS COLTEN ..... *Appellant*

Vs.

COMMONWEALTH OF KENTUCKY ..... *Appellee*

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

OPINION BELOW

The opinion below from the Court of Appeals of Kentucky is reported as Colten v. Commonwealth, 467 S.W.2d 374 (1971).

JURISDICTION

Appellant contends jurisdiction is conferred by 28 USC § 1257 (2).

QUESTIONS PRESENTED

I.

WHETHER IN THIS CASE, IN WHICH APPELLANT WAS CONVICTED OF DISORDERLY CONDUCT FOR FAILING TO DISPERSE UPON LAWFUL ORDER OF THE POLICE THE QUESTIONS OF (1) VAGUENESS AND OVERBREADTH OF THE LAW AND (2) UNCONSTITUTIONALITY

OF APPLICATION OF THE DISORDERLY CONDUCT LAW TO FACTS IN THIS CASE ON FREEDOM OF ASSEMBLY AND SPEECH GROUNDS, ARE SUBSTANTIAL.

II.

WHETHER THE FACT THAT APPELLANT EXERCISED HIS RIGHT TO A TRIAL DE NOVO IN THE COURT OF GENERAL JURISDICTION AND RECEIVED A GREATER PENALTY THAN THAT IMPOSED IN A COURT OF LIMITED JURISDICTION RESULTED IN A DENIAL OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

STATEMENT OF THE CASE

This is an appeal from the Kentucky Court of Appeals affirming a decision in the Fayette Circuit Court imposing a fine of $50 upon the Appellant on a charge of disorderly conduct.

Appellant, Lewis Colten, was first found guilty on March 6, 1970 in the Fayette Quarterly for the misdemeanor. (T.R. p. 2).

Appellant filed a notice of appeal from the Quarterly Court judgment on March 18, 1970, (T.R. p. 1) On April 24 and 27, 1970, appellant was granted a *de novo* trial in the Fayette Circuit Court. (T.E. p. 1) Appellant elected to have his case tried without a jury. (T.E. p. 3) At the conclusion of the evidence the court found appellant guilty and fixed his fine at $50.00 (possible six-month jail sentence and $500.00 fine). KRS 437.016 (T.E. p. 206). The Kentucky Court of Appeals affirmed the decision of the Circuit Court on May 21, 1971.

Appellant testified at the trial that he and others were at the Bluegrass Field Airport on March 3, 1970 to conduct a counter-demonstration at the time Mrs. Nixon left from Lexington. (TE p. 114) Appellant stated that his group was protesting "against the pseudo volunteer program that she tried to force

down Lexingtonian's throats." (TE p. 106) Appellant stated that his group intended to ignore Mrs. Nixon and demonstrate in behalf of their gubernatorial candidate, Sam Mason. (TE pp. 102, 106)

Appellant's group was a coalition of the Young Democrats, Students for a Democratic Society, Student Mobilization Committee, and concerned students and citizens. (TE p. 107) Appellant was a member of the Steering Committee which runs the Students for a Democratic Society. (TE pp. 113, 115) Appellant considered himself a spokesman for the group, and he had given speeches at the airport that day. (TE pp. 104, 111)

After Mrs. Nixon's plane had departed, appellant's group formed a procession with their cars as they left the airport. (TE pp. 90, 104) One of the cars in the procession driven by *Guy Mendez* was stopped by State Trooper *John R. Miller* for having an expired Louisiana license plate. (TE pp. 6, 7, 159) Trooper Miller had earlier issued a citation to Norbert McGuire for having an expired license plate and an expired inspection sticker. (TE p. 6)

Mr. Mendez pulled his car over onto the shoulder of the Airport Road which leads from the airport to Highway 60. Trooper Miller parked his car behind Mendez's car. Appellant pulled his car in behind Trooper Miller's. (TE pp. 5-8) Appellant stated that other cars in the procession pulled over to the side of the road in front of and behind the three above mentioned cars. (TE pp. 91, 92, 107) A witness for appellant, *Gennelle Geis*, stated that from six to ten cars in the procession pulled over to the side of the road. (TE pp. 170, 174)

Trooper Miller testified that while he was talking to Mr. Mendez appellant "came up and wanted to know why I had stopped this automobile, and I explained to him that the vehicle had expired license plates and that I intended to give him a citation, and he insisted on questioning me as to why I was stopping him, and became quite obnoxious. I asked him to go

back to his car and clear the area and he did not. He stayed in the area and kept trying to get a conversation going." (TE p. 9)

Trooper Miller told appellant that he was not arresting Mendez. He only intended to detain him long enough to make out the citation. He thought appellant wanted to cause trouble because he did not leave. (TE p. 16)

Trooper Miller stated that because appellant was interfering with his giving the citation he and Mr. Mendez got inside Trooper Miller's car and rolled up the windows. (TE pp. 10, 16, 17) Trooper Miller finished making out the citation there. (TE p. 10)

Captain James Mayes, of Frankfort, was in command of the state troopers at the airport. (TE p. 23) He testified that 15 or 16 people were standing in the roadway around the cars. He stopped his car in the right hand lane as it was blocked by the group of people. (TE p. 26) He asked the crowd 4 or 5 times to leave. (TE pp. 27, 28) He noticed appellant in the group. (TE p. 29) Captain Mayes then walked ahead to clear the area. (TE p. 28) Trooper Miller had testified earlier that the traffic was heavy. (TE p. 12)

Trooper T. H. Brown stated that he stopped his car behind that of Captain Mayes. (TE p. 37) He heard Captain Mayes tell the group to move on away. (TE p. 38) He spoke to appellant twice and asked him to leave. (TE pp. 39, 47) Instead of getting into his car appellant walked around to the right side of the cars. (TE pp. 40, 47) Appellant stated that he wanted to see if anyone in Mendez's car wanted a ride. (TE p. 50)

State *Trooper Kenneth Harlowe* testified that he had earlier noticed appellant in the airport. At the time Mrs. Nixon's plane was leaving appellant stated that his group was going to have a party. According to Trooper Harlowe, they went out onto the grass "whooping and hollering" and creating a scene. (TE p. 68) Appellant and the others were also hindering people as they were going in and out of the airport. (TE p. 69)

Trooper Harlowe stated that appellant was in with the group of 12-18 people standing in the roadway next to Trooper Miller's car. (TE pp. 57-59) He stated that Captain Mayes asked the crowd to leave. Some of them did not, including appellant. (TE pp. 58-61) Appellant told Trooper Harlowe that he was going to stay around and see what happened. (TE pp. 60, 61, 63)

Appellant testified that Trooper Harlowe asked him to leave. (TE p. 96) Appellant replied "Well, okay, but can I take these people with me." Appellant stated that the Trooper then came up to him and said, "I'm going to tell you one more time, get out of here." Appellant replied, "Okay, I would like to take these people with me." Trooper Harlowe then grabbed appellant's arm and asked him again if he was going to leave. (TE p. 97) Appellant stated that he replied, "Sure, I'm going but can I take these people with me." (TE p. 98)

Trooper Harlowe turned appellant over to the men at the police wagon. (TE p. 74) Appellant testified that he had stopped his car as one of his "brothers" had been stopped by a police officer and he was concerned about that person being stopped. He stated that he stood behind Trooper Miller and did not say anything. (TE p. 92)

Appellant testified that he questioned Mendez as he was walking to trooper Miller's car. (TE pp. 93, 94, 109) Appellant stated that he wanted to tell Mendez that he (appellant) had gotten a six weeks extension in which to purchase his new Pennsylvania license plates. (TE pp. 94, 107) Appellant stated that he did not speak to Trooper Miller and he did not hear Trooper Miller talk to him. (TE pp. 95, 109)

While Mendez was sitting in Trooper Miller's car, appellant stated that he tapped on the window to ask Mendez if his car was being confiscated. (TE p. 96) Appellant stated that some of the people in Mendez's car thought that the car might be

taken. He told them that he had some room in his car if they needed a ride. (TE p. 95)

Appellant denied saying that he was going to stay around to see what happened. (TE p. 99) He stated that he did not see Captain Mayes. (TE pp. 100, 109)

Appellant's witnesses generally denied some of the allegations made by the State Troopers. *Sallie Phillips* testified that the witnesses had gotten together with the defense attorneys the day before the trial. They exchanged their views as to what they had seen. (TE p. 149) They were told that the differences in their stories were due to different standing positions. She stated that they were told to tell the truth. (TE p. 151)

All of the witnesses who had pulled over to the side of the road denied seeing no parking signs along the road. (TE pp. 121, 137, 156, 165) *Earl Craig Winkle* testified that he did not hear any orders to leave and did not see anyone standing in the road. (TE pp. 124, 129) Sallie Phillips did not hear any orders to leave the area until after appellant was apprehended. (TE p. 137) She did not see appellant standing in the road and she stated that there was no traffic on the road. (TE pp. 136, 138, 143, 145) Trooper Harlowe testified earlier that Lieutenant Moberly directed traffic around the area of congestion. (TE p. 60)

Guy M. Mendez, III testified that there were a large number of cars at the airport belonging to Young Republicans and other people. (TE p. 156) Mendez stated that Trooper Miller told him and the others in his car that his car would have to be towed in. (TE pp. 152, 153) He stated that appellant told Trooper Harlowe to let him go. (TE p. 156)

Gennelle Geis did not see any traffic. (TE p. 173) She stated that a state trooper asked her to leave. (TE p. 178) Appellant's other witness, *Gary Lee Seale*, saw some people in the roadway. (TE p. 168)

The trial court elected to believe the testimony of the state troopers. It found that appellant should have gone back with the others to their cars when directed to do so by Captain Mayes and the other State Troopers. The court found appellant guilty of the misdemeanor, disorderly conduct, and fixed his fine at $50.00. (TE pp. 202-206)

SUMMARY OF ARGUMENT

Appellant was not engaging in any protected conduct and may not challenge the law for vagueness or overbreadth; it is not overly broad or vague anyway.

The fact that Appellant exercised his right to a trial *de novo* in no way chilled his right to appeal.

ARGUMENT

I.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL.

The statute challenged as overly broad and vague is KRS 437.016, Subsection (f), stated as follows:

> (1) A person is guilty of disorderly conduct if with intent to cause public inconvenience, annoyance or alarm, or recklessly creating risk thereof, he: (f) congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse.

"Public" and "Public place" are defined in KRS 437.011

> "(1) 'Public' means affecting or likely to affect a substantial group of persons.
>
> "(2) 'Public place' means a place to which the public has access, and includes but is not limited to highways, transportation facilities, schools, places of amusement, parks, places of business, playgrounds and hallways, lobbies and other portions of apartment houses and

hotels not constituting rooms or apartments designed for actual residence."

It is difficult to comprehend appellant contending this statute to be unconstitutional by virtue of being overly broad and/or vague. It certainly is as narrow as the subject matter permits and specifically delineates the conduct prohibited. See *Cameron v. Johnson*, 390 U.S. 611 (1968) where this Court stated:

> " . . . We conclude that the statute clearly and precisely delineates its reaches in words of common understanding. It is a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be . . . proscribed. *Edwards v. South Carolina*, 372 U.S. 229, 236, 83 S. Ct. 680, 684, 9. L. Ed. 697."

Surely this statute cannot be considered to be drawn in language "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." See *Connally v. General Construction Company*, 269 U. S. 385, 391 (1926); *O'Leary v. Commonwealth, Ky.*, 441 S.W.2d 150, 156 (1969); *United States v. Petrillo*, 332 U.S. 1 (1947).

The appellee believes that the constitutionality of this statute must be judged on the basis of the facts present in this case and not some irrelevant, hypothetical situation. *United States v. Raines*, 362 U.S. 17 (1960); *O'Leary v. Commonwealth*, supra; 16 C. J. S. Constitutional Law § 94.

Appellant relies on *Edwards v. South Carolina*, 372 U.S. 229 and *Coates v. Cincinnati*, ____ U.S.____, 29 L. Ed. 214 (1971) as supporting his belief that his constitutional right to assemble was stifled. However, these cases are easily distinguishable in that both cases involved a legitimate purpose for assemblage while in the case at bar the conduct of appellant interferred with a legitimate police function, that being clearing the road of traffic.

The Kentucky Court of Appeals phrased a perfect answer to appellant's claim:

> "... Colten was not seeking to express a thought to any listener or to disseminate any idea. He simply was trying to irritate the police by his presence and by efforts at interruption. Nor was he exercising the right of peaceable assembly, because that right, we believe, contemplates that the assembly is for some bona fide purpose other than merely to assemble, and Colten's group appears to have had no purpose other than to cause inconvenience and annoyance. So the statute as applied here did not chill or stifle the exercise of any constitutional right." 467 S.W.2d 374, at 379

Appellant would have the Court hold that the First Amendment right to assemble and of free speech condones a person interefring with a policeman in the performance of his duties. We believe that this is an entirely untenable position. It is hard to imagine a more obvious and flagrant flounting of the law than is apparent in this case. After being asked and then told to leave some nine or ten times, appellant still refused to leave. Surely this is not constitutionally protected conduct.

II.

KENTUCKY'S SYSTEM OF ALLOWING A TRIAL *DE NOVO* IN THE CIRCUIT COURT (GENERAL JURISDICTION) FROM A JUDGMENT IN QUARTERLY COURT (COURT OF LIMITED JURISDICTION) DOES NOT CHILL THE RIGHT TO APPEAL AND DEPRIVE ONE OF ANY CONSTITUTIONAL RIGHTS.

Appellant bases his contention that the increase of the penalty at the trial *de novo* was unconstitutional, on *North Carolina v. Pearce*, 395 U.S. 711 (1969). Appellee believes that this case is easily distinguishable from the case at bar. *Pearce* stands for the proposition that a defendant's right, by appeal, to obtain relief from errors committed at the initial trial, cannot be "chilled" or stifled by the imposition of a greater penalty at his new trial,

in the absence of a showing of lack of vindictiveness or retaliation aimed at the defendant for exercising his right to appeal.

In this case, there is no concern for errors committed at the trial in the lower court. The appellant at his trial *de novo* participated in a whole new horse race.

A trial *de novo* is not an appeal in the sense of *Pearce*. Indeed, a person can plead guilty in quarterly court and still obtain a *de novo* trial in circuit court. *Brown v. Hoblitzell*, Ky., 307 S.W.2d 739, 746 (1956). The circuit court, by reason of its forum, would conduct a more thorough trial than a police or quarterly court. Indubitably there would be more evidence, more witnesses, and a broader legal emcompassment. The circuit court would therefore have much more upon which to base its decision. To go one step further, if appellant had not waived a jury, would he now complain that he jury could not increase the penalty adjudged in the quarterly court? Surely not. Cf. *Brooks v. Commonwealth*, Ky., 447 S.W.2d 614 (1969).

Therefore, the exercise of the trial *de novo* and the subsequent finding of guilty and the penalty thereby adjudged is not related to the decision of the quarterly court and is entirely independent. This is no way "chilled" appellant's right to appeal.

CONCLUSION

Because appellant does not present a substantial Federal question, this appeal should be dismissed, or in the alternative the decision of the Kentucky Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, U.S. postage prepaid to Hon. Alvin L. Goldman, 1692 Williamsburg Road, Lexington, Kentucky 40504; Hon. Natalie Wilson, Citiens Union Bank Building, Lexington, Kentucky 40507; and Hon. Melvin L. Wulf and Sanford Jay Rosen, American Civil Liberties Union Foundation, 156 Fifth Avenue, New York, New York 10010, this 16 day of November, 1971.

Robert W. Willmott, Jr.
Assistant Attorney General

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-404

LEWIS COLTEN,

Appellant,

—v.—

COMMONWEALTH OF KENTUCKY,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

BRIEF FOR THE APPELLANT

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Bordua & Tifft, *Citizen Interviews, Organizational Feedback, and Police-Community Relations Decisions*, 6 Law & Society Rev. 155 (1971) 25

Chevigny, *Police Power: Police Abuses in New York City* (1969) 37

Hahn, *Ghetto Assessments of Police Protection and Authority*, 6 Law & Society Rev. 183 (1971) 25

Keiser, The Vice Lords, at 46 (1969) 21

Meltzer & Trott, *Disorderly Conduct*, 4 Harv. Civ. Rights L. Rev. 311 (1969) 39

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Model Penal Code, Tentative Draft No. 13 at 14 (1961) 39
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Note, *The Overbreadth Doctrine,* 83 Harv. L. Rev. 844 (1970) 26

President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police, at 187 25

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Rosenbaum & DeCharms, *Direct and Vicarious Reduction of Hostility,* 60 J. of Abnormal Psych. 105 (1960) 21
Rossiter, Jr. & Bostrom, *Personal Usage and Offensiveness of Taboo Words,* paper delivered at Int'l Communication Ass'n Meeting, Cleveland, Ohio, Apr. 1970 21

Tiffany, McIntyre & Rotenberg, Detection of Crime, at 187 (1967) 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-404

LEWIS COLTEN,

Appellant,

—v.—

COMMONWEALTH OF KENTUCKY,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

BRIEF FOR THE APPELLANT

Opinion Below

The opinion of the Kentucky Court of Appeals (Juris. State., pp. 1a-11a) is reported at 467 S.W.2d 374. The opinion of the Fayette Circuit Court (Juris. State., pp. 12a-15a) is not officially reported.

Jurisdiction

The Kentucky Court of Appeals issued its judgment on May 21, 1971 and its order and mandate was entered on June 22, 1971. The Jurisdictional Statement was filed on September 20, 1971, and probable jurisdiction was noted on January 10, 1972. The jurisdiction of the Court rests on 28 U.S.C. §1257(2).

Constitutional and Statutory Provisions Involved

A) Constitution of the United States, Amendments I and XIV, §1.

B) KRS §437.016 found in 1968 Cumulative Supplement to the Kentucky Revised Statutes at p. 1272:

437.016 *"Disorderly conduct" defined; penalty*

(1) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(a) Engages in fighting or in violent, tumultuous or threatening behavior; or

(b) Makes unreasonable noise; or

(c) In a public place uses abusive or obscene language, or makes an obscene gesture; or

(d) Without lawful authority, disturbs any lawful assembly or meeting of persons; or

(e) Obstructs vehicular or pedestrian traffic; or

(f) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or

(g) Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose.

(2) Disorderly conduct is punishable by imprisonment in jail for not more than six months, by a fine of not more than $500, or both.

C) Rules 12.02 and 12.06 of the Kentucky Rules of Criminal Procedure found in 1968 Cumulative Supplement to the Kentucky Revised Statutes at pp. 1430-1431:

12.02 *Manner of Taking*

(1) An appeal to the circuit court is taken by filing with the clerk thereof a certified copy of the judgment and the amount of costs, and causing to be executed before the clerk a bond to the effect that the defendant will pay the costs of the appeal and perform the judgment which may be rendered against him on the appeal; whereupon, the clerk shall issue an order to the judge or the justice rendering the judgment, to stay proceedings thereon, and to transmit to the office of said clerk all the original papers in the prosecution.

(2) The applicable provisions governing bail shall apply to the bond provided for in subsection (1).

(3) After the service of the order to stay proceedings, no execution shall be issued from the inferior court, and any officer on whom the order is served shall return the execution in his hands as suspended by appeal.

12.06 *Schedule and Manner of Trial; Judgment*

Appeals taken to the circuit court shall be docketed by the clerk thereof as a regular criminal prosecution and shall be tried anew, as if no judgment had been rendered, and the judgment shall be considered as affirmed to the extent of the punishment, if any, adjudged against the defendant in the circuit court, and thereupon he shall be adjudged to pay the costs of the appeal. If an appeal taken to the circuit court be dismissed, the judgment of the court from which it was taken shall stand affirmed and the costs of the appeal shall be paid by the party whose appeal is dismissed.

Questions Presented for Review

I. Whether the Kentucky Disorderly Conduct Statute, KRS 437.016 has been rendered unconstitutionally broad and vague by the Kentucky Court of Appeal's holding that where, in the opinion of the Kentucky courts, non-obscene, non-defamatory assembly or expression does not possess minimum social value, such assembly or expression can be treated as unlawful if it causes mere inconvenience or annoyance to police officers?

II. Whether the Kentucky Disorderly Conduct Statute has been rendered unconstitutionally broad and vague by application of the statute to convict a person on the grounds that (a) he failed to leave when ordered by the police to do so at the scene of the issuance of a motor vehicle citation to another person where the person charged with disorderly conduct either stated that he wished to observe what was happening or stated that he wished to aid affected persons to secure transportation home; or (b) on the grounds that his presence was judicially characterized as having caused others to congregate in a roadway?

III. Where, under a state's rules of criminal procedure a conviction in a lower criminal court can be appealed only by trial *de novo* in the court of general jurisdiction, and where upon conviction at such an appeal by trial *de novo* and without setting forth any special grounds of justification, the court of general jurisdiction fixes the penalty five times greater than that set by the lower criminal court, has the right to appeal been unconstitutionally chilled and fettered and has the defendant been unconstitutionally twice placed in jeopardy, all in violation of the due process clause of the Fourteenth Amendment?

Statement of the Case

A. *The Events.*

On March 3, 1970, Mrs. Richard M. Nixon toured Lexington, Kentucky. Appellant, Lewis Colten, went to the Bluegrass Airport, which serves Lexington, to conduct a "counter-demonstration" at the time of Mrs. Nixon's departure (App., pp. 54, 58). Appellant stated that the group with which he was associated (a coalition of the Young Democrats, Students for a Democratic Society, Student Mobilization Committee, and individuals) intended overtly to ignore Mrs. Nixon and to conduct a show of support for a gubernatorial candidate, Sam Mason (App., pp. 52, 54).

Mr. Colten is a young person with a long moustache and long hair who dresses in a manner which the Fayette Circuit Court described as "differently than what the great majority of society would believe in . . ." (App., p. 109). While in the terminal area, at about the time Mrs. Nixon's plane was preparing to take off, Mr. Colten was observed by the purported arresting officer, Trooper Harlowe. Trooper Harlowe's testimony of this first encounter with Colten was as follows: "[A]s the airplane was getting ready to leave they [including Colten] came up to me where I was stationed at, at the airport, and said, 'We're going to have a party.' I said, 'Not out here,' so they then proceeded to get over on the lawn of the airport and throw themselves a little whooping and hollering party over there or whatever they call it, creating a scene" (App., p. 40). Trooper Harlowe's testimony made it clear that he was offended by Colten's style of dress and presence at the airport "with an awfully lot of important people traveling in and out . . ."

(App., p. 41). Although he declined to make a specific finding either way, the Fayette Circuit judge noted that: "It may be that the police officers were hostile toward this defendant because of his appearance . . ." (App., p. 110). No arrest was made at this time.

After Mrs. Nixon's plane departed, people at the airport terminal left via the access road (App., pp. 4, 6). Colten was driving a car with two passengers and had room for three or four more (App., pp. 43-44, 84). He was directly behind a vehicle operated by Guy Mendez. The Mendez car carried a total of five persons (App., p. 80).

At the direction of State Police Officer John R. Miller, the Mendez car pulled over onto the shoulder of the outbound traffic lane, off the access road. Officer Miller pulled off the road directly behind the Mendez car, and on seeing this, Colten, who knew Mendez, pulled off of the road and behind Officer Miller's vehicle (App., pp. 6, 45). Officer Miller found that Mendez had an expired Louisiana license plate and had pulled Mendez over for the purpose of issuing a citation (App., p. 5). Officer Miller informed the occupants of Mendez's car that it would have to be towed away (App., pp. 47, 79).

Colten approached Officer Miller and Mr. Mendez inquiring as to what was happening. There is disputed testimony as to whom he addressed his inquiry, whether to Mendez or to Officer Miller (App., pp. 6-7, 46-47, 82-83). According to Colten, he had received a six-week extension on securing new Pennsylvania plates for his car and he sought to question Mendez as to whether he had possibly received a similar extension (App., p. 47). Miller testified that Colten spoke to him (App., pp. 6-7). Although the

trial court did not resolve this factual dispute, the Kentucky Court of Appeals found that Colten addressed himself to Trooper Miller, and that "Colten continued to endeavor to engage Miller in conversation, and to offer advice to Mendez, until Miller got into his patrol car with Mendez and rolled up the windows to shut out Colten's interference" (467 S.W.2d at 376). Trooper Miller's testimony that he rolled up his window was contradicted by the testimony of his superior officer (App., p. 19). There is, however, no dispute but that Officer Miller completed the issuance of the citation from inside his patrol car without assistance and he made no requests for anyone to arrest Colten, nor did he attempt to do so himself (App., pp. 7, 12, 16, 82-83).

Additional State Police and County Police Officers arrived, their number being variously estimated as 5 to 10 (App., pp. 20, 70, 87, 93). Additional non-police cars pulled onto the shoulder. Thereafter the number of people in the vicinity of Mendez's car was variously estimated as 4 to 18. Most of the testimony, including Officer Miller's, made it clear that they were standing in several different separated groups (App., pp. 8, 56, 59, 81, 92-93).

Captain Mayes of the State Police told the people standing around to get into their cars and leave. He testified that he did not specifically see Mr. Colten at this time or specifically ask him to leave (App., pp. 16-17). State Police Officer T. H. Brown testified that when he arrived he twice said to Mr. Colten: "Now, this is none of your affair, what's going on here, get back in your car and please move on and clear the road" (App., p. 23). Trooper Brown also testified that Colten said he wanted to see if anyone in Mendez's car needed a ride (App., p. 30).

The prosecutor attempted to establish that Colten had stood in the road and caused an obstruction to traffic in violation of subsection (e) of KRS 437.016. However, the evidence against Colten was at best unclear. It generally showed that there was little traffic. Although some people may have been in the road for a short time, traffic blockage, if there was any, was caused by the later arriving police vehicles which parked in the road even though they could have pulled onto the grass on the other side of the access road (App., pp. 13, 16, 20-21, 24-25, 34, 35-36, 59, 70-71, 78, 81-82, 90). Moreover, the trial court rejected the obstruction-to-traffic theory as the basis for finding Colten guilty (Juris. State. 14a—bottom of page). Nevertheless, the Kentucky Court of Appeals said that Colten's continued presence "encouraged and led the *others* to stay, blocking a traffic lane . . ." (467 S.W.2d at 376). (Emphasis supplied.)

Officer Harlowe, the purported arresting officer, testified that he first saw Colten at the edge of the road (App., p. 34), that he asked Colten to leave (App., pp. 36-37), and that, when asked to leave, Colten said that he was going to stay around and see what happened (App., pp. 35, 37). Colten denied making this response (App., p. 50). Almost all of the evidence described Colten as speaking quietly to Officer Harlowe (App., pp. 49-50, 65, 85). Yet, as the defense witnesses testified, Officer Harlowe said to Colten: "Okay, loudmouth, get back in the car," or words to that effect (App., pp. 49, 64, 71). Colten's response was that he would, but that he first wanted to help the people needing rides (App., pp. 48-49, 63-64, 71). On cross-examination, Officer Harlowe admitted that he may have addressed Colten as "loudmouth" and that he may have said to him

"You've caused enough trouble today" (App., pp. 37-39). Officer Harlowe, referring to his previously noted personal impressions concerning Colten's appearance, stated that he felt that Colten had "caused enough trouble" (App., pp. 38-41). Officer Harlowe also admitted that Colten "might have" asked whether he could give a ride to some of the people in the Mendez vehicle (App., p. 42). And in his decision, the Circuit Court judge noted: "I appreciate the fact that he [Colten] may have been wanting to help . . ." (App., p. 111).

Although there is clear evidence that Officer Harlowe took Colten into physical custody, there is also evidence that he never told Colten that he was under arrest and that, in fact, after grabbing Colten he again asked Colten whether he would leave (App., pp. 49-50, 64-65, 73-74). The evidence is clear that, from the time Harlowe ordered Colten to leave through the time he took Colten into physical custody, Colten was constantly standing well off the road on a grassy shoulder area (App., pp. 36, 62, 70, 80). Upon grabbing Colten, Trooper Harlowe was joined by other police officers. The evidence showed that Mr. Colten was then punched, his hair and moustache pulled by these other officers, and that he was tossed into a police van (App., pp. 49-50, 64, 67, 72-73, 81-82, 85-86, 89). One police officer testified that he heard what was possibly a scream of pain from Colten (App., p. 33). And, the Circuit Court in its decision stated: "I think that the police officers may have also been a little rougher in this instance than may have been necessary. I don't know, I don't find that they did or did not" (App., p. 110).

B. *The Proceedings.*

On March 6th, 1970, Colten was tried without jury in Fayette County Quarterly Court, a court of limited criminal jurisdiction, and convicted under KRS 437.016. He was fined $10 plus costs. The closing argument of the defense asserted that the application of the statute to this case was prohibited by the due process and equal protection clauses of the Constitution of the United States. There is no record of these proceedings.

Colten appealed his conviction pursuant to Rule 12.02 of the Kentucky Rules of Criminal Procedure which permits an appeal by trial *de novo* in the court of general original jurisdiction, the Circuit Court. Prior to the resulting trial *de novo* in Fayette Circuit Court, Criminal Division, Appellant again raised his constitutional challenges to KRS 437.016 by a pre-trial motion to dismiss on the grounds that KRS 437.016 is overly vague and void for overbreadth under the Fourteenth Amendment. The court denied this motion at the opening of trial.

By consent, the trial *de novo* was without a jury. The Circuit Court found Appellant guilty under subsection (f) of KRS 437.016 (refusing to comply with a lawful order of the police to disperse) and fined him $50 and costs. The court offered no explanation for the increased penalty. Appellant's challenges to the constitutionality of KRS 437.016 under the Fourteenth Amendment were renewed on a motion for a directed verdict at the close of the prosecutor's case. They were again renewed in closing argument and once more upon a motion for a new trial. In addition, Appellant challenged, at these times, the application of the statute to the facts of the case on the grounds that such application would violate the Equal Protection

clause of the Fourteenth Amendment, and would give KRS 437.016 an interpretation which would do further violence to the due process clause of the Fourteenth Amendment. After judgment was rendered, Appellant moved the trial court to correct the penalty imposed so as not to exceed that imposed by the court below. This motion was based on the due process clause of the Fourteenth Amendment. The Circuit Court rejected all of Appellant's constitutional objections.

Colten appealed to the Court of Appeals of Kentucky asserting the unconstitutionality of the Disorderly Conduct statute both on its face and as applied. Colten also challenged the constitutionality of the Circuit Court's imposition of a greater penalty on the *de novo* retrial than that which had been imposed below.

C. *Decision of the Kentucky Court.*

The Kentucky Court of Appeals construed the Disorderly Conduct statute as applying whenever the predominant intent of one who has committed any of the proscribed forms of conduct is to cause public inconvenience, annoyance or alarm. That predominant intent, held the Kentucky court, can be inferred from the lack of bona fide intent to exercise a constitutional right or from the finding that the interest advanced by the exercise of a constitutional right is insignificant in comparison with the inconvenience, annoyance or alarm caused by the exercise. Applying that test to the instant case, the Kentucky court ruled that "[t]he evidence warranted the inference . . . that Colten's real intent was simply to aggravate, harass, annoy and inconvenience the police, for no purpose other than the pleasure of aggravation, harassment, annoyance

and inconvenience." 467 S.W.2d at 376. It upheld Colten's conviction, rejecting the challenge that the Disorderly Conduct statute is unconstitutional on its face and as applied to Colten.

Also rejected by the Kentucky Court of Appeals was Colten's challenge to the constitutionality of imposing, upon the trial *de novo* on appeal from an inferior criminal court, a greater penalty than that imposed below. The Kentucky court noted that one can plead guilty in Quarterly Court and still receive a trial *de novo* appeal in Circuit Court. It explained that its reading of *North Carolina* v. *Pearce,* 395 U.S. 711, permits the state to put a "price on the accused's privilege of a choice of courts as distinguished from pricing the right to obtain a fair trial in one court which the state fixes as the sole forum." 467 S.W.2d at 379.

Summary of Argument

I. The Kentucky high court has construed its Disorderly Conduct statute as a prohibition upon assembly and expression where the accused has no bona fide intent to exercise a constitutional right or where the constitutional right exercised is of insufficient interest to justify the inconvenience and annoyance caused by that exercise. In so construing the statute, the Kentucky court has permitted constitutional values to be overbalanced by mere relief from inconvenience and annoyance. This test was rejected in *Edwards* v. *South Carolina,* 372 U.S. 229, and elsewhere. In justifying its result, the Kentucky court has misconstrued the rationale of *Roth* v. *United States,* 354 U.S. 476, and its progeny by applying the redeeming social value approach to non-erotic expression.

The restraints on expression, assembly and the like encompassed in Kentucky's Disorderly Conduct statute are so vague as to provide no meaningful guidance to the person seeking to live within the law. As a result, law enforcement officials are given unbridled discretion in applying the law. Accordingly, KRS 437.016 suffers the defects condemned in *Coates* v. *City of Cincinnati,* 402 U.S. 611, and like cases. Moreover, the Kentucky decision compounds the error of vagueness by placing on the accused the burden of proving the legitimacy of his expression or assembly.

A further defect of the Disorderly Conduct statute is its sweeping reach into the realm of constitutionally protected rights. Clearly protected exercises of assembly and expression, such as peaceful picketing, can be restrained under this statute. In addition, by permitting the speaker's or assembler's intent, rather than action, to be determinative, the Kentucky decision encroaches upon freedom of thought and conscience.

II. In applying its statute, Colten's conduct was judged not by constitutional standards but by the court's own notions of preferred modes of behavior. *Cohen* v. *California,* 403 U.S. 15. Because he was peacefully assembling in a public place, creating no risk of harm, and violating no lawful restrictions upon the use of that public property, Colten had a constitutionally protected right to be, and remain, where he was. Accordingly, his arrest cannot be justified on his failure to respond to police orders to "move on." *Shuttlesworth* v. *Birmingham,* 394 U.S. 147; *Wright* v. *Georgia,* 373 U.S. 284. His conduct was similarly protected because he was seeking to convey information to a friend and because he was observing an event of public interest—the issuance of a citation. Moreover, the record

reveals that Colten's arrest was not generated by his conduct, rather it was the product of police antipathy toward persons of his life style which, combined with duty fatigue, resulted in an assault upon him. Because of its vagueness, the Disorderly Conduct statute was a mask for this abuse of police authority, thus providing a concrete illustration of the evil inherent in such vague and overly broad laws.

III. The Kentucky court additionally erred by refusing to apply the rule of *North Carolina* v. *Pearce,* 395 U.S. 711, to trial *de novo* appeals. There is no meaningful difference between retrial on remand for error and retrials on trial *de novo* appeal. In the first instance the error has been specifically found; in the second instance it has been irrebuttably presumed as a matter of law. In either case, the prospect of an increased penalty upon retrial creates an apprehension of vindictiveness and places a price upon the statutory right of appeal. As stated in *Pearce,* due process prohibits a procedure which places an Appellant in such fear or which imposes such a price upon the granted right of appeal. Moreover, the opinion of the Kentucky court implies approval of assessing heavier penalties upon retrial as an appropriate price for having appealed. Such a policy is forbidden by considerations of due process. Further, in Kentucky the *de novo* appeal provides the sole constitutional trial. Hence, placing a price on the appeal for a *de novo* trial amounts to placing a price upon the right to receive a fair trial.

Increasing the penalty upon a trial *de novo* appeal also violates the protection from double jeopardy inasmuch as the defendant is twice forced to run the gantlet of defending himself in order to receive but a single constitutional trial.

ARGUMENT

I.

The Kentucky Disorderly Conduct statute, KRS 437.016, has been rendered unconstitutionally broad and vague by the Kentucky court's holding that where, in the opinion of the Kentucky courts, non-obscene, non-defamatory assembly or expression does not possess minimum social value, such assembly or expression can be treated as unlawful if it causes mere inconvenience or annoyance to police officers.

A. *The Kentucky Court's Construction of the Statute.*

The Kentucky court's construction of the Disorderly Conduct statute sustains convictions for engaging in proscribed conduct with a "predominant" intent to cause public inconvenience, annoyance or alarm, or for recklessly creating a risk thereof. 467 S.W.2d at 377. A finding of the requisite predominant intent can result either because the defendant had "no bona fide intent to exercise a constitutional right" or because "the interest to be advanced by the particular exercise of a constitutional right is insignificant in comparison with the inconvenience, annoyance or alarm caused by the exercise." *Ibid.*

As the Kentucky court explained: "We think it is a matter of balancing interests and that where the interest which the individual seeks to advance through exercise of freedom of speech is minuscule in comparison with the public's interest in being protected from the consequences of that exercise, the public's interest should prevail even though the harm the public might be exposed to is no more than

inconvenience or annoyance." *Ibid.* The Kentucky court found guidance in the *"Fanny Hill"* case, 383 U.S. 413, saying: "If the lack of redeeming social value is a basis upon which the right of freedom of speech may be required to yield to the protection of contemporary standards of morality . . . , it would seem that the public's interest in being protected from inconvenience, annoyance or alarm should prevail over any claimed right to utter speech that has no social value." *Ibid.*

On its face, subsection (f) of the Kentucky statute, the provision under which Colten was convicted, appears to condition guilt on two questions: a) Was there a lawful basis for ordering a public assembly to disperse; and b) Was there an intent, actual or constructive, to cause public inconvenience, annoyance or alarm? The Kentucky court's interpretive gloss substitutes, instead, a single balancing test: Was the assembly of less significant value than the public interest in being free from any resulting inconvenience, annoyance or alarm? In casting this balance, the value of that assembly will be disregarded by the Kentucky court if the defendant lacked a "bona fide" intent to exercise his constitutional right. And included in the "public interest" scale of the balance is any annoyance or inconvenience to the police. This interpretation of the Kentucky Disorderly Conduct statute misconstrues the guiding constitutional doctrines and renders the Kentucky Act constitutionally void for over-breadth and vagueness.

B. *The Kentucky Court Has Misconstrued the Redeeming Social Value Test by Applying It to a Non-obscenity, Non-defamation Statute.*

It is not without irony that the Kentucky court made the various controlling criteria of the *Roth* and *"Fanny Hill"* tests generally applicable to freedom of expression, assembly, and association, inasmuch as the Kentucky court has consistently rejected the doctrines of those cases when dealing with obscenity. *Cain* v. *Commonwealth,* 437 S.W.2d 769 (Ky. 1969), *rev'd per curiam* 397 U.S. 319; *Hayes* v. *Commonwealth,* 470 S.W.2d 601 (Ky. 1971). By importing the obscenity tests to the instant statute, the Kentucky court has departed from the prevailing constitutional standard for non-obscene, non-defamation speech, i.e., the test of clear and imminent danger of a real and substantial evil. *Coates* v. *City of Cincinnati,* 402 U.S. 611; *Brandenburg* v. *Ohio,* 395 U.S. 444; *Edwards* v. *South Carolina,* 372 U.S. 229.

In *Cohen* v. *California,* 403 U.S. 15, Mr. Justice Harlan, speaking for the Court, rejected the application of the obscenity standards of *Roth* to situations which do not in some significant way involve erotic expression. 403 U.S. at 20. And that rejection is wholly consistent with the underlying rationale of *Roth.*

In *Roth,* examining the history of guarantees of speech and press, the Court concluded that the Framers of the Amendment did not intend obscenity to be within the scope of constitutionally protected expression. *Roth* v. *United States,* 354 U.S. 476, 481-83. But sex and obscenity are not synonymous. *Roth, supra,* 354 U.S. at 487. Hence, the criteria of predominant interest, prevailing community standards and redeeming social value, debated and described in

Roth and subsequent decisions, focus on the means for determining whether expression involving sex is obscene and is, therefore, unprotected expression, as contrasted with expression not properly characterized as obscene and, therefore, not subject to regulation absent satisfaction of the normal constitutional safeguard provided by the clear and imminent danger test. The Kentucky court did not show, nor could it show, that the type of assembly, expression or association involved here was historically or otherwise relegated to the unprotected level of assembly, expression or association; reserved for "obscenity" and some forms of defamation, e.g., *New York Times Co.* v. *Sullivan*, 376 U.S. 254. It is obvious, therefore, that the obscenity doctrine is wholly inappropriate for non-obscenity situations, like the one involved in this case.[1] This Court has so held. *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175, 182.

The deficiency of the Kentucky court's reasoning flows at least in part from its failure to recognize that the freedoms of assembly, association and expression are constitutionally fixed at the highest level of social value. Only other constitutionally fixed values and the value of being free from imminent danger of substantial harm can be balanced against the constitutionally fixed values of expression, association and assembly. No other values can constitutionally be weighed against First Amendment type freedoms. As Mr. Justice Douglas stated, speaking for the Court in *Terminiello* v. *Chicago*, 337 U.S. 1, 4:

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[1] It is by no means clear that the *Roth* criteria are fully applicable any longer, or that the proper inquiry concerns the question of whether there is a class of so-called "obscene" speech which is unprotected without regard to inquiry as to its effects. See, e.g., *Redrup* v. *New York*, 386 U.S. 767.

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest. . . . There is no room under our Constitution for a more restrictive view.

This constitutional doctrine was reiterated by the Court, speaking through Mr. Justice Stewart, in *Edwards* v. *South Carolina,* 372 U.S. 229, 237-38. Thus, the Kentucky court has erred in permitting constitutionally fixed values to be overbalanced by the mere value of relief from inconvenience, annoyance, harassment and the like.

C. *The Overly Vague Gloss Placed on the Disorderly Conduct Statute Gives Unbridled and Therefore Unconstitutional Discretion to the Police.*

A statute is unconstitutionally vague if it holds a person criminally responsible for conduct which he could not reasonably understand to be proscribed. *United States* v. *Harriss,* 347 U.S. 612, 617; *Bouie* v. *Columbia,* 378 U.S. 347, 351; *Wright* v. *Georgia,* 373 U.S. 284, 293; *Palmer* v. *City of Euclid, Ohio,* 402 U.S. 544, 546. The due process protection against overly vague statutes serves, as well, to protect against unbridled discretion being placed in the hands of the police, prosecutors, juries or courts in estab-

lishing what conduct is to be subject to criminal penalties. *Herndon* v. *Lowry*, 301 U.S. 242, 263; *Scott* v. *District Attorney*, 309 F. Supp. 833, 836 (E.D. La. 1970); *Severson* v. *Duff*, 322 F. Supp. 4, 6 (M.D. Fla. 1970). The constitutional standard for over-vagueness is, of course, that a statute or charge must be phrased in terms sufficiently definite so that men of common intelligence will not have to guess at its meaning and application. *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453; *Connally* v. *General Construction Co.*, 269 U.S. 385, 393. And, the demands of statutory precision are especially great in statutes, such as this, which reach freedom of expression. (See authorities cited in Mr. Justice Harlan's concurrence in *Garner* v. *Louisiana*, 368 U.S. 157, 206.)

The interpretive gloss placed upon the Kentucky Disorderly Conduct statute does not remove the blatant vagueness of the standards of conduct established by that statute. For example, subsection (a) of the Act prohibits the engaging in "tumultuous" behavior. Webster's Third New International Dictionary includes in its definition of "tumultuous" the following: "Full of commotion and uproar." This would normally define almost any group gathered to watch a sporting event. It would also describe the conduct of a large group of purchasers attending a bargain sale. If such conduct causes inconvenience or annoyance to some members of the public, does the Act make that conduct subject to punishment under the Disorderly Conduct statute?

Subsection (b) prohibits the making of "unreasonable" noise. A loud sneeze at a dramatic performance may be "unreasonable" and certainly is publicly annoying. Speaking in a loud voice in a park area where infants are asleep in carriages may be an "unreasonable" noise. Is conduct of this sort made criminal by the Disorderly Conduct statute?

Subsection (c) prohibits the use of "abusive" language. Does this encompass only "fighting words?" *Chaplinsky* v. *New Hampshire,* 315 U.S. 568. Does it encompass the use of abusive language amongst persons who, because of custom or circumstance, do not take offense at the language?[2] Does it encompass the use of abusive language under circumstances in which the use of such language reduces rather than promotes the prospect of abusive behavior?[3] A similarly worded provision was struck down as overly vague in *Wilson* v. *Goodi[illegible]*, 303 F. Supp. 952 (N.D. Ga. 1969), *app. dismissed,* 396 U.S. 112, *aff'd,* 431 F.2d 855 (5th Cir. 1970).

Subsection (d) makes conduct unlawful if one "disturbs any lawful assembly or meeting of persons." To pose an unpopular question to a popular speaker may well be "disturbing." To make a critical or seemingly absurd comment may be "disturbing." To boo or hiss a popular speaker or one who holds a position of high stature may be "disturbing." Is this sort of conduct prohibited by the Disorderly Conduct statute?

Subsection (g) of the Act prohibits the creating of "physically offensive" conditions by any act that serves no

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[2] A. Montagu, Anatomy of Swearing (1967) (*passim*); see, e.g., R. L. Keiser, The Vice Lords at 46 (1969).

Empirical research has shown that listeners take less offense at the use of "abusive" or "profane" words if they perceive that the speaker has justification for resorting to strong language. C. Rossiter, Jr. & R. Bostrom, *Personal Usage and Offensiveness of Taboo Words,* Paper delivered at Int'l Communication Ass'n Meeting, Cleveland, Ohio, Apr. 1970.

[3] Verbalizing hostility has been found, under many circumstances, to reduce the incidence of hostile behavior both of the verbalizers and of their sympathizers. Rosenbaum & DeCharms, *Direct and Vicarious Reduction of Hostility,* 60 J. of Abnormal Psych. 105 (1960).

legitimate purpose. If one dresses in tattered garb or clashing colors, has a physically offensive condition been created by an act which may serve no legitimate purpose? If one walks in public with an exposed wound, has a physically offensive condition been created by an act which serves no legitimate purpose? Is this sort of conduct condemned by the Disorderly Conduct statute?

From the Kentucky court's construction of the statute, it appears that in all of the foregoing situations the accused may be found guilty if he lacked a good faith intent to exercise constitutional rights or if his rights are found to be overbalanced by any resulting inconvenience or annoyance. From the results in the instant case, it would appear that if a policeman is annoyed at an accused's conduct, he can make an arrest in good faith. The only practical guidance for one who wishes to avoid such an arrest in Kentucky is that if his appearance or views are unpopular with the police, he can anticipate arrest. And, if they are equally unpopular with the court or jury, he can anticipate conviction. The statute, as construed, provides no legitimate guidelines either for the person whose conduct is being regulated nor for law enforcement officials.

Coates v. *City of Cincinnati*, 402 U.S. 611, is authority for striking down this statute. In the *Coates* case three justices argued that there was a potential for the state judiciary to narrow the city's annoying assembly ordinance through interpretation and thereby avoid constitutional defects. In the instant case we have already had the benefit of the state court's interpretive explication. And, as so interpreted, the vagueness of the Kentucky Disorderly Conduct statute causes it to fall of its own weight.

> The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. *Coates* v. *City of Cincinnati, supra,* 402 U.S. at 615. *Accord, Papachriston* v. *Jacksonville,* No. 70-5030; *Smith* v. *Florida,* No. 70-5055 (decided by this Court on Feb. 24, 1972, and voiding on vagueness grounds Florida's vagrancy law). See also, *Owens* v. *Commonwealth,* 211 Va. 633, 179 S.E.2d 477 (Va. 1971) (holding state unlawful assembly law unconstitutional for using standard less rigorous than clear and present danger).

Moreover, a statute is unconstitutionally vague where, as in the Kentucky court's interpretation of this statute, it places on the accused the burden of establishing the legitimacy of his assembly or speech. The burden of demonstrating that conduct is illegitimate belongs to the state. See, e.g., *Wright* v. *Georgia,* 373 U.S. 284, 292-93; *Thomas* v. *Collins,* 323 U.S. 516, 530. See also, *New York Times Co.* v. *Sullivan,* 376 U.S. 254. Cf. *Speiser* v. *Randall,* 357 U.S. 513. For this reason, too, the Kentucky statute is unconstitutional.

The Kentucky Court's error is especially evident when one considers that under its approach the critical issue of bona fide intent can be made a matter of inference, as it was here. Thus, conduct which constitutionally is to be unfettered, will be subject to penalty if the court or jury is displeased by the defendant's frame of mind. Moreover, the unconstitutional vagueness of the Kentucky law becomes even more apparent when one considers that the

Kentucky court will find that an accused lacked the "legitimate objective" required by its decision if, as more fully explored in Point II below, alternative means for assembly and expression could have been utilized. 467 S.W.2d at 376. Thus, the person regulated must explore and weigh all alternatives of conduct in order to find guidance respecting the lawfulness or unlawfulness of his conduct under this statute.

The most serious danger emanating from the Kentucky court's vague construction of the Disorderly Conduct statute results from the fact that it leaves too much to the policeman's discretion. Such a law, as noted by this Court in *Coates* v. *City of Cincinnati,* 402 U.S. 611, 616, "contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their life style or their physical appearance is resented by the majority of their fellow citizens." See also, *Wheeler* v. *Goodman,* 306 F. Supp. 58, 62 (W.D. N.C. 1969) (3 judge court), appeal pending No. 70-26 argued Dec. 8, 1971, 40 U.S.L.W. 3277.

This vice of vagueness in the Kentucky statute is similar to the one discussed in *Shuttlesworth* v. *Birmingham,* 382 U.S. 87. Because it is disorderly conduct for a group to cause any sense of annoyance if it is assembled "with no legitimate purpose," the Kentucky statute could be applied, like *Shuttlesworth,* to a group of civil rights leaders chatting together on a downtown sidewalk. Restraint of conduct in such situations is thus left to the "whim of any police officer . . ." 382 U.S. at 90. As Mr. Justice Stewart, speaking for the Court in *Shuttlesworth,* stated: "Instinct with its ever-present potential for arbitrarily suppressing

First Amendment liberties, that kind of law bears the hallmark of a police state." 382 U.S. at 90-91.

Such abuse is far from an imagined danger to our society. Research shows that ghetto dwellers list as a prominent source of antagonism to the police their experience with arbitrary enforcement of vaguely-worded disorderly conduct, vagrancy, loitering, breach of the peace, and similar statutes. E.g., *Report of the National Advisory Commission on Civil Disorders* at 303-05 (Bantam ed. 1968); D. Bordua & L. Tifft, *Citizen Interviews, Organizational Feedback, and Police-Community Relations Decisions*, 6 Law & Society Rev. 155, 163-64 (1971). Authoritative sources state that there is frequent police misuse of statutes giving broad discretion to law enforcement authorities. *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police* at 187-88; D. Bordua & L. Tifft, *Citizen Interviews, Organizational Feedback, and Police-Community Relations Decisions*, 6 Law & Society Rev. 155, 159 (1971). Moreover, these very abuses themselves generate much of the difficulty encountered in conducting effective law enforcement operations.[4]

That these police abuses of authority and excessive discretion exist and are a serious affront to constitutionally guaranteed liberty was acknowledged by this Court in *Terry* v. *Ohio*, 392 U.S. 1, 15. And, in that same decision, this Court reaffirmed that the judiciary continues to have

[4] Ghetto perceptions of police conduct appear to be highly related to expressed unwillingness to cooperate with police officers. H. Hahn, *Ghetto Assessments of Police Protection and Authority*, 6 Law & Society Rev. 183, 191 (1971). Police harassment generates a hostility which lessens overall law enforcement effectiveness. Tiffany, McIntyre & Rotenberg, *Detection of Crime* at 187 (1967).

a responsibility "to guard against police conduct which is overbearing or harassing . . ." *Ibid.* Rejection of overly vague statutes such as this Kentucky statute, which provide law enforcement officers with seeming authority for engaging in overbearing police conduct, is a prime way in which the judiciary can meet the responsibility reaffirmed in *Terry.*

D. *The Statute as Construed Is Constitutionally Void for Overbreadth.*

It is a well settled law that a statute is constitutionally void if its sweep "operates as a disincentive"[5] to the exercise of protected First Amendment type liberty. The resulting *in terrorem* or "chilling" effect on protected conduct is constitutionally impermissible. E.g., *Thomas* v. *Collins,* 323 U.S. 516, 530-32; *Shelton* v. *Tucker,* 364 U.S. 479, 488; *NAACP* v. *Button,* 371 U.S. 415, 432-33; *Griswold* v. *Connecticut,* 381 U.S. 479, 482-83. The sweep of the Kentucky court's construction of the Kentucky Disorderly Conduct statute chills the exercise of the rights of expression, assembly, petition for redress, and association.

KRS 437.016 reaches numerous forms of constitutionally protected conduct. Its provisions regulate and apply to various types of expression and assembly such as the making of noise and the public use of language and gestures. Thus, subsection (b) prohibits "unreasonable" noise. Subsection (c) prohibits abusive language or obscene language or gestures in a public place. Similarly, Section 437.016(f), the specific provision involved in Colten's conviction, reaches assembly in a public place. In light of the

[5] Note, *The Overbreadth Doctrine,* 83 Harv. L. Rev. 844, 853 (1970).

Kentucky court's interpretive gloss, and as shown by that court's application of the statute in this case, this last subsection of the Disorderly Conduct statute makes peaceful assembly in a public place unlawful if it aggravates, harasses, annoys or inconveniences a police officer absent a finding of predominant intent to exercise a constitutional right, or a finding that such right has sufficient social benefit to outweigh the inconvenience or annoyance caused to the police.

In the instant case, and as will be more fully explored in Point II of this brief, the defendant engaged in expression when he sought to advise a friend of a possible basis for non-issuance of a motor vehicle citation; he engaged in assembly and expression by observing the public act of issuing a citation; and he engaged in association in seeking peacefully to come to the aid of persons who seemed to need transportation back to their home locale. Although admitting that any inconvenience or annoyance generated by this conduct was "not great" (467 S.W.2d at 376), the Kentucky court held that such conduct was unlawful under this statute.

The degree to which the Kentucky court's construction of this Act reaches constitutionally protected conduct can be further illustrated by considering likely applications of that court's approach. For example, where paid union pickets walk in front of a struck plant on a bitter cold day, causing law enforcement officers to patrol the area against possible violence, subsection (f) of the Disorderly Conduct statute, as construed, might permit a police dispersal order and the arrest and conviction of any picketers who fail to disperse. The intent of the paid picket could reasonably be found to be other than the exercise of a

constitutional right—he pickets for economic gain. And the inconvenience and annoyance caused thereby to the police is obvious and considerable. Hence, under the enunciated Kentucky standard, a conviction might well follow. But such overly broad application would clearly reach constitutionally protected conduct. *Thornhill* v. *Alabama*, 310 U.S. 88; *Amalgamated Food Employees* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308.

As a result of the Kentucky court's ruling in the instant case, when a person is ordered without good cause to "move" by a policeman, that person will risk conviction for disorderly conduct under subsection (f) of the Act if he fails to comply. Thus, the Act deters that person from exercising his constitutional right to question the police officer's order, and places each citizen at the whim and caprice of each policeman. See *Thompson* v. *Louisville*, 362 U.S. 199; *Wright* v. *Georgia*, 373 U.S. 284; *Brown* v. *Louisiana*, 383 U.S. 131; *Shuttlesworth* v. *Birmingham*, 382 U.S. 87.

Similarly, the person who publicly advocates or protests is deterred from using sharp, emotive words or colorful or base language because to do so in Kentucky is to risk a conviction under the Kentucky Disorderly Conduct statute for having used abusive or "obscene" language. Nevertheless, such expression is constitutionally protected. *Brandenburg* v. *Ohio*, 395 U.S. 444 (per curiam); *Cohen* v. *California*, 403 U.S. 15; *Street* v. *New York*, 394 U.S. 576; *Watts* v. *United States*, 394 U.S. 705; *Tinker* v. *Des Moines School District*, 393 U.S. 503; *Terminiello* v. *Chicago*, 337 U.S. 1; *Cantwell* v. *Connecticut*, 310 U.S. 296.

Thus, under the Kentucky court's holding, had Colten worn a jacket at the airport reading "Fuck the Nixon Pro-

gram," Officer Harlowe's concern for the annoyance and inconvenience to the "important people travelling in and out" of the airport would have been a ground for his arresting Colten under subsection (c) of the Act. Having found under the instant facts that Colten's predominant intent in remaining to see what transpired or to aid friends was to annoy and harass, and therefore not a "bona fide" exercise of constitutional rights, the Kentucky court would, in the hypothetical, undoubtedly reach the same result on the same reasoning. Yet such a decision would fly in the face of *Cohen* v. *California,* 403 U.S. 15 where Mr. Justice Harlan, speaking for the Court, stated:

> We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why "[w]holly neutral futilities . . . come under the protection of free speech as fully as to Keats' poems or Donne's sermons," [Citing authority] and why "so long as the means are peaceful, the communication need not meet standards of acceptability" [Citing authority]. 403 U.S. at 25.

In arguing the instant case before the Kentucky Court of Appeals, counsel offered a hypothetical to illustrate the excessive sweep of this statute. That hypothetical assumed the situation of a long-haired, bearded, barefooted speaker addressing a group of policemen and their wives stating: "You wonder why we call you pigs? I'll tell you why. Pigs are gluttonous and you people are so gluttonous that you have sold your souls to be the armed might of the establishment. We call you pigs because that's what you are." It was noted that such a situation would likely fall within the scope of subsections (c) and (g) of this Act as viewed on its

face. Now that we have the benefit of the Kentucky court's interpretive gloss, there is little doubt but that it would find the harassment and annoyance involved in such a situation to outweigh the exercise of constitutional right. Although not specifically ruling on that hypothetical, the Kentucky court provided clear guidance respecting its view of the illustrative situation when, rejecting Colten's unequal enforcement argument, the court remarked: "Colten complains of the fact that the arresting officer called him a 'loudmouth' when making the arrest, but we think this complaint comes with little grace from a man who argues in his brief the right of a citizen to call policemen *and their wives* 'pigs.' The evidence warrants the conclusion that Colten was in fact a 'loudmouth,' which fact tends to show an *absence* of discrimination in the enforcement of the statute against him, because 'loudmouths' are the class of persons who ordinarily would commit violations of the statute." 467 S.W.2d at 379. (Emphasis in original.) Yet, unless the circumstances in which such words were uttered clearly showed them to be fighting words, under the cases, the hypothetical conduct would be constitutionally protected. *Cohen* v. *California*, 403 U.S. 15; *Edwards* v. *South Carolina*, 372 U.S. 229; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Terminiello* v. *Chicago*, 337 U.S. 1.

The Kentucky court's test is so sweeping that guilt turns on the speaker's or assembler's thoughts or intent, not upon the impact of the alleged imminent substantial evil which will result from his conduct. The Kentucky court's decision in the instant case thereby sweeps freedom of thought and conscience into the scope of its prohibitions and for this reason, also, the Disorderly Conduct statute is constitutionally invalid under numerous prior decisions of this

Court. E.g., *DeJonge* v. *Oregon*, 299 U.S. 353; *Herndon* v. *Lowry*, 301 U.S. 242; *Street* v. *New York*, 394 U.S. 576; *Baird* v. *Arizona*, 401 U.S. 1, 6, 9.

Both the opinion of the Kentucky court, and its failure to attempt a confining interpretation, reveal that the sweeping constructive gloss placed upon the statute was an intentional choice resulting probably from the court's misconception of the constitutional imperatives. Other courts faced with similar statutes of apparent overbreadth have interpretively narrowed, rather than broadened, the statutory sweep. (For a contrasting decision see *Middlebrooks* v. *City of Birmingham*, 170 So.2d 424 (Ala. 1964).) Reversal in this case is required not only to eliminate this constitutionally void statute, but also to unequivocally apprise the Kentucky Court of Appeals, as well as other courts, of the proper doctrinal approach in construing and applying laws affecting First Amendment liberties.

II.

The facts in this case reveal that the Kentucky Disorderly Conduct statute has been rendered unconstitutionally broad and vague by application of the statute to convict the appellant (a) on the grounds that he failed to leave when ordered by the police to do so at the scene of the issuance of a motor vehicle citation to another person where the appellant either stated that he wished to observe what was happening or stated that he wished to aid affected persons to secure transportation home; or (b) on the grounds that the appellant's presence was judicially characterized as having caused others to congregate in a roadway.

The Kentucky court's decision makes it clear that whatever Colten was guilty of doing, he did not create any great inconvenience or annoyance. 467 S.W.2d at 376. This reason, alone, is enough to justify reversing the decision of the Kentucky court on the grounds that its application of the Disorderly Conduct statute has rendered it unconstitutional. *Edwards* v. *South Carolina*, 372 U.S. 229.[6] Nor, does the Kentucky decision make it clear as to just what Colten was guilty of doing or just what the nature was of any resulting inconvenience or annoyance.

The Kentucky court's decision states that Colten was not exercising his constitutional rights in good faith, and was

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[6] See also, *In re Little*, 40 U.S.L.W. 3349 (per curiam). Surely, if mere annoyance is insufficient grounds for penalizing those who affront the sensibilities of judges, there is no basis for imposing any greater protection for the sensibilities of policemen, the group seemingly annoyed by Colten.

pursuing an intention to harass and annoy the police. It supports this finding by suggesting that Colten could have accomplished his stated goal of assisting his friends by following a different course of conduct—promptly arranging for the passengers of Mendez's car to join him, and passing word to Mendez that someone would wait for him down the road. 467 S.W.2d at 376. (If, as Officer Miller testified, the patrol car windows were closed, the latter course would not have been possible.) The trial judge too had suggestions of how Colten could have handled the situation without getting into trouble. In his decision, the trial judge said that Colten should have gone back to his car and waited until the police were finished with Mendez. These suggestions are instructive because they reveal the extent to which a balancing test has been used in judging Colten. He did wrong, according to the Kentucky courts, because, if in his shoes, the judges would have acted otherwise.

Of course, neither set of suggestions would have placed Colten in compliance with the police orders. The police did not order him back to his car or even to hurry up and complete his business. They ordered him to leave. Officer Brown testified, for example, that he told Colten to get back in his car and "move on and clear the road" (App., p. 23). Trooper Harlowe testified that he told Colten to leave because Captain Mayes "had already made it clear that he was to be on his way" (App., p. 35). In any event, the mere fact that Colten did not act as some judges would have acted cannot be the basis for a constitutional conviction. *Cohen* v. *California,* 403 U.S. 15, 25.

Colten's presence in this public place was not a trespass, thereby distinguishing this case from the majority position in *Adderly* v. *Florida,* 385 U.S. 39 and the dissenting posi-

tion in *Brown* v. *Louisiana*, 383 U.S. 131, 151. The evidence did not show any restrictions upon public use of the shoulder area where Colten was arrested. Nor was the case prosecuted or decided on a basis of any restrictions upon the use of this public place.

Colten's conduct created no risk—substantial or otherwise, imminent or distant—of riot or disorder, thereby distinguishing this case from the majority position in *Feiner* v. *New York*, 340 U.S. 315 and the dissenting positions in *Edwards* v. *South Carolina*, 372 U.S. 229, 238 and *Terminiello* v. *Chicago*, 337 U.S. 1, 8, 13. Although the Kentucky Court of Appeals stated that Colten's presence encouraged and led others to stay, blocking a traffic lane (467 S.W.2d at 376), the evidence established that any blockage was the result of the choice of police to stop their vehicles in the traffic lane rather than pulling off onto the opposite shoulder (App., pp. 13, 16, 21, 24-25, 34, 35, 58, 59, 70-71, 151, 81-82, 90-91). More importantly, unlike the circumstances in *Feiner* (and like those in *Edwards*), there was ample police manpower on hand to control the situation and to remove any obstructions caused by the persons standing in the road. And, of course, the possibility of disorder by others is not a basis for refusing someone else his right to be present. *Wright* v. *Georgia*, 373 U.S. 284, 293; *Henry* v. *City of Rock Hill*, 376 U.S. 776 (per curiam).

Perhaps Colten's guilt lies in the Kentucky courts' finding that he failed to leave after several police requests to do so. But only in a police state is the bare failure to obey the order of a policeman grounds for punishment. As Mr. Justice White noted in his concurring opinion in *Terry* v. *Ohio*, 392 U.S. 1, 34: "There is nothing in the Constitution which prevents a policeman from addressing questions to

anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked *but may refuse to cooperate and go on his way.*" (Emphasis supplied.) See also *Wright* v. *Georgia*, 373 U.S. 284, 291-92. The use of public areas cannot be withheld at will by officials, such as policemen, "dispensing or withholding permission to speak, assemble, picket or parade, according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency' or 'morals' of the community." *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 153; *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614-615; *Gomez* v. *Wilson*, 323 F. Supp. 87 (D.D.C. 1971). Accordingly, Colten's guilt cannot turn on the mere fact that he did not leave when told to do so.

Attempting to detract from Colten's constitutional contention, the Kentucky Court of Appeals asserted that he was not exercising his freedom of speech because he was not expressing a thought or disseminating an idea. But freedom of expression and assembly are not limited to the realm of ideas and thoughts. Social and artistic expression, too, are protected. *Coates* v. *City of Cincinnati*, 402 U.S. 611, 615; *Jacobellis* v. *Ohio*, 378 U.S. 184, 191 (Brennan, J. with Goldberg, J.); *Roth* v. *United States*, 354 U.S. 476, 498 (Harlan, J. concurring); *Winters* v. *New York*, 333 U.S. 507, 510. Moreover, the facts show that Colten was seeking to disseminate information both to Mendez and to Mendez's passengers. Further, Colten was engaged in another facet of free speech. He was observing the issuance of a motor vehicle citation; that is, he was exercising his constitutionally protected right to receive information. *Lamont* v. *Postmaster General*, 381 U.S. 301; *Stanley* v. *Georgia*, 394 U.S. 557, 564; *Martin* v. *City of*

Struthers, 319 U.S. 141, 143. Colten was, therefore, exercising constitutional rights when ordered to leave. Certainly in the absence of any showing of overwhelming public need justifying the restraint on his conduct, the application of the Disorderly Conduct statute to his situation was unconstitutional. *Edwards* v. *South Carolina,* 372 U.S. 229. Moreover, his conviction was unconstitutional because of a total absence of proof respecting any wrongful conduct. *Thompson* v. *Louisville,* 362 U.S. 199.

What were the real life dynamics of the transactions when Colten was arrested? What reason could have motivated the police to order Colten to leave? After all, the situation was well under control. The real reason probably is that the police as a rule order spectators to leave when they are issuing citations or arresting people. The "Move on" order is a typical police response. But why is this their reaction? Young people and black people, as well as others, will tell you that this is the reaction of the police because they do not want witnesses to acts of brutality. In the overwhelming majority of cases, that suspicion is undoubtedly wrong, but it is there. And because it is there, it is especially important that the right of peaceable assembly on such occasions not be infringed. That is the only way that we can allay the suspicions of those who doubt the fairness of our system and the equality with which law is administered.

One might ask a question similar to that asked by Mr. Justice White concurring in *Brown* v. *Louisiana,* 383 U.S. 131, 150-151. Had Colten been middle-aged, dressed in a business suit, and wearing closely cropped hair, would he have been ordered to move on? Would he have been grabbed by the arm, shoved toward the road, had his hair

pulled and his head beaten and been placed under arrest for disorderly conduct? A realistic appraisal of the situation strongly suggests that Colten was not arrested for disorderly conduct. Disorderly conduct entered the picture later as a *post hoc* justification for the arrest. He was arrested because some policemen, after a long tense day protecting the First Lady, were unable to resist the temptation first to order about this hippie-demonstrator type, then to grab him, and finally to rough him up. Having lost their professional composure, the police attempted to mask their error with a charge. See generally, P. Chevigny, *Police Power: Police Abuses in New York City* (1969). Because it is so sweeping and so vague, the Disorderly Conduct statute was a logical choice. By applying the Disorderly Conduct statute to Colten, therefore, the Kentucky Court of Appeals permitted its law to become the type of unconstitutionally sweeping and vague tool which this Court, as previously noted, warned against in *Coates* v. *City of Cincinnati*, 402 U.S. 611, 616: "[S]uch a prohibition . . . contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their life style or their physical appearance is resented by the majority of their fellow citizens." A statute so construed and applied cannot be the law in a free society.

III.

The due process clause of the Fourteenth Amendment is violated, the right to appeal is unconstitutionally fettered and chilled, and the defendant is unconstitutionally twice placed in jeopardy where, under a state's rules of criminal procedure, a conviction in a lower criminal court can be appealed only by a trial *de novo* in the court of general jurisdiction, and where upon conviction at such an appeal by trial *de novo* and without setting forth any special grounds of justification, the court of general jurisdiction fixes the penalty five times greater than that set by the lower criminal court.

A. *Kentucky Extracts a Price as a Condition of Exercising the Right to Appeal From the Errors of Inferior Courts.*

Kentucky gives a statutory right of appeal before the Circuit Court to persons convicted in the inferior criminal courts. (KRS 23.032.) By Rule that appeal is through a trial *de novo* even when the defendant is seeking to review errors of law only. Ky. R. Cr. 12.02, 12.06. The inferior criminal courts affected by this appellate system have jurisdiction over crimes punishable by up to $500 fine and up to 12 months' imprisonment. (KRS 25.010, 26.010.) At the trial *de novo* appeal from an inferior criminal court, the judge or jury may impose a harsher penalty than that which was fixed at the first trial, even though no explanation is provided or could be provided to justify that increase. 467 S.W.2d at 379. See R. Cr. 12.02, 12.06; see also, *Brooks* v. *Commonwealth,* 447 S.W.2d 614 (Ky. 1969) (holding that *North Carolina* v. *Pearce,* 395 U.S. 711, does not apply to remand retrials in which the jury sets the penalty).

In the instant case, the defendant was penalized by a fivefold increase in his fine for having exercised his sole avenue of appeal from the Quarterly Court—a *de novo* trial in the Circuit Court. The price extracted for exercising the right of appeal from the Quarterly Court judgment was far more severe in *Bell* v. *Commonwealth,* petition for certiorari pending, No. 70-5304, where the defendant was fined One ($1.00) Dollar plus costs in Quarterly Court but Five Hundred ($500.00) Dollars plus five (5) months and twenty-eight (28) days' imprisonment when he appealed to the Circuit Court. In both cases substantive constitutional issues were raised by the *de novo* appeal.

With admirable candor the Kentucky Court of Appeals stated, below: "Under our system of justice the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses." 467 S.W.2d at 379. This characterization of the inferior criminal courts is not unique. It has, for example, been observed that such courts tend to rubber stamp police action in disorderly conduct arrests. Model Penal Code, Tentative Draft No. 13 at 14 (1961); Meltzer & Trott, *Disorderly Conduct,* 4 Harv. Civ. Rights L. Rev. 311, 316 (1969).

Thus, under Kentucky law a defendant in any criminal action involving a potential fine of up to Five Hundred ($500.00) Dollars and a potential sentence of up to twelve (12) months' imprisonment, normally must run the gantlet of the lower court's penalty before his constitutional rights are safeguarded and, if the lower court has shown any

restraint in imposing the penalty, he must then risk a more severe penalty in order to secure those protections of justice which are available only in the court of general jurisdiction—the Circuit Court. The Kentucky Court of Appeals, seemingly trying to give reassurance respecting this burden of a potential increase in penalty as a condition of appeal from inferior court errors, notes: "An accused who wants a full-blown trial, in a court of general jurisdiction designed to give full protection to his rights, may appeal to the circuit court and obtain a trial de novo. If he so desires, he need not undergo the bother of a trial in the inferior court, for he can plead guilty there and still appeal to the circuit court." 467 S.W.2d at 379. That is, one seeking to safeguard his constitutional rights in Kentucky, need merely place himself *twice* in jeopardy.

B. North Carolina v. Pearce *Is Fully Applicable.*

The guiding authority respecting this issue is *North Carolina* v. *Pearce,* 395 U.S. 711. It held that where a retrial results from remand, a more severe penalty cannot be imposed than was fixed at the first trial absent a specific statement of reasons for that increase based on objective information respecting identifiable conduct on the part of the defendant, occurring after the original sentencing. The holding of *Pearce* is equally compelling here; there is no meaningful distinction between a retrial on remand and a trial *de novo* appeal. The controlling issue in this case is the same as that stated by the Court in *Pearce.* "When at the behest of the defendant a criminal conviction has been set aside and a new trial ordered, to what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial?" 395 U.S. at 713.

In both situations, retrial on remand and retrial on appeal, the second trial is a trial *de novo*. The only distinction is the authority for the new trial. In the *Pearce* type situation the authority for retrial is a decision resulting from an appellate court's review of the specific record; in the appeal by trial *de novo* situation the authority is a statute or a judge-made rule applicable to all cases. In the *Pearce* type situation the retrial order results from a specific finding of trial error in a particular case. In the trial *de novo* appeal, a legislative or judicial rule making determination has been made to the effect that it is reasonable and convenient to presume that because of procedural deficiencies in the inferior court, errors have occurred. In both situations the cure for the error is a new trial. Accordingly, the rule of *North Carolina* v. *Pearce* is equally applicable to trial *de novo* appeals.[7]

C. *Due Process Prohibits the Fettering of the Right to Appeal by the Threat of an Increased Penalty Upon Appeal.*

The holding in *Pearce* was explained by the Court as necessitated by due process in order to protect from judi-

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[7] *Wood* v. *Ross*, 434 F.2d 297 (4th Cir. 1970), *app. at sub nom.*, *North Carolina* v. *Rice*, 40 U.S.L.W. 4073 (U.S. December 14, 1971) (per curiam) (vacated and remanded on grounds of possible mootness); *Bronstein* v. *Superior Court*, 475 P.2d 235 (Ariz. 1970); *State* v. *Skah*, 466 P.2d 420 (Hawaii 1970); *Eldridge* v. *State*, 267 N.E.2d 48 (Ind. 1971); *Cherry* v. *State*, 264 A.2d 887 (Md. 1970); *State* v. *DeBonis*, 276 A.2d 137 (N.J. 1971); *Commonwealth* v. *Harper*, 280 A.2d 637 (Pa. 1971). Contra, *Walsh* v. *Picard*, 446 F.2d 1209 (1st Cir. 1971); *Lemieux* v. *Robbins*, 414 F.2d 353 (1st Cir. 1969), *cert. denied*, 397 U.S. 1017 (1970); *Mann* v. *Commonwealth*, 271 N.E.2d 331 (Mass. 1971); *People* v. *Olary*, 170 N.W.2d 842 (Mich. 1969); *State* v. *Stanosheck*, 180 N.W.2d 226 (Neb. 1970); *State* v. *Sparrow*, 173 S.E.2d 897 (N.C. 1970); *State* v. *Spencer*, 173 S.E.2d 765 (N.C. 1970); *Evans* v. *City of Richmond*, 171 S.E.2d 247 (Va. 1969).

cial vindictiveness one who has dared exercise his right of appeal. It was also necessitated as a protection against the chilling effect which apprehension of such vindictiveness can have upon the defendant's propensity to exercise his statutory right of appeal. 395 U.S. at 725. And, the holding was further explained as necessitated on the grounds that once a statutory right of appeal has been granted "a court 'is without right to . . . put a price on an appeal. 'A defendant's exercise of a right of appeal must be free and unfettered.'" 395 U.S. at 724.

To permit a harsher punishment upon a trial *de novo* appeal is to force the defendant into a game of procedural Russian Roulette. Where, as in this case, that appeal will raise constitutional issues, such a deterrent is especially unfair and unwise. Cf. *Fay* v. *Noia*, 372 U.S. 391. The chilling effect of that gamble is enough to bring the *de novo* review within the holding of *Pearce*.

Moreover, circuit court trial judges can be as vindictive towards defendants who encumber their courts with trials for *de novo* review as they can be toward those who encumber the courts with retrials resulting from reversals or remand orders. Accordingly, if protection from such actual or feared vindictiveness is warranted in *Pearce*, it is equally warranted here. Whether in fact such abuse has occurred is not the critical question. As *Pearce* teaches us, the mere appearance of abuse itself violates the safeguards of due process. 395 U.S. at 725. Cf. *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145. In fact, there can be no question but that the opportunity to impose a greater penalty on *de novo* review deters the defendant who is considering appealing the inferior court's ruling on law or fact. That this is so

admitted by implication in the Kentucky court's opinion below. 467 S.W.2d at 379. See also, *Lemieux* v. *Robbins*, 414 F.2d 353, 355-56 (1st Cir. 1969), *cert. denied*, 397 U.S. 1017. In *Pearce* the Court responded to these due process demands with a protective rule. The same rule is required here.

The Kentucky court's position characterizing the higher penalty as the "price" paid for the defendant's choice to go to Circuit Court (467 S.W.2d at 379) runs head-on against the clear pronouncement in *Pearce*: "It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." 395 U.S. at 723-24. The only difference between this pronounced prohibition and the policy apparently approved by the Kentucky court is that the Kentucky court prefers to characterize the heavier sentence as a "price" rather than label it as a punishment. But that very labelling of the harsher penalty as a "price" itself suggests to the lower courts that such payment is due in all cases. Therefore, the present Kentucky policy respecting increased penalties in *de novo* appeals should be rejected as violative of due process, and the *Pearce* rule made applicable, because the present Kentucky rule imposes a price on the right of appeal and chills the exercise of that right. *North Carolina* v. *Pearce*, 395 U.S. 711, 724.

It is significant, too, that the Kentucky Court of Appeals euphemistically speaks of the accused "electing" to be tried in Circuit Court, when in fact the only election of forum under Kentucky Criminal Procedure is in the hands of the arresting officer. Under Kentucky law, the Circuit Court

has jurisdiction over misdemeanors concurrent with the inferior courts—the Quarterly, Police, and Justice courts. KRS 25.010, 26.010. The choice of forum is made by the arresting officer's selection of the court to which he brings the defendant. Ky. R. Cr. 3.02, 3.04. Therefore, if the arresting officer selects a Circuit Court, the accused can appeal from trial error without being faced with the prospect of a more severe penalty; whereas if the arresting officer selects an inferior court, appeal from error is available only under threat of an increase in penalty. Thus, the unfairness of the trial *de novo* appeals process in Kentucky is compounded by the fact that control over the availability of an unburdened appeal rests in the uncontrolled and, therefore, arbitrary discretion of the arresting officer.

Some courts which have rejected application of *Pearce* to *de novo* appeals have argued that to limit the superior trial level court to the punishment below is to deprive the court of its independent judgment on the factors before it. See, e.g., *State* v. *Sparrow,* 173 S.E.2d 897, 903 (N.C. 1970). But this can be said as well of the second judgment in a pure *Pearce* type retrial. A trial court has no vested interest in imposing a particular penalty. Its judgmental authority is not "independent" but rather it is always confined by law.

It has also been argued that a restraint on the extent of punishment results in inequality between prosecutor and defendant in *de novo* appeals. See, e.g., *Lemieux* v. *Robbins,* 414 F.2d 353, 355 (1st Cir. 1969), *cert. denied,* 397 U.S. 1017. Here again, however, the same is true in the pure *Pearce* situation. Further, constitutional due process standards such as the protection from being twice placed

in jeopardy reject the idea that in our system of criminal justice a prosecutor should somehow have parallel procedural opportunities with those afforded the defendant.

The First Circuit in *Lemieux* conceded that the possibility of a greater penalty on a *de novo* appeal does have a chilling effect on the exercise of the right to appeal. 414 F.2d at 355-56. But, that court ruled, the chilling effect must be tolerated because it serves "legitimate state objectives." Just how those state objectives differ from those rejected by the Supreme Court in *Pearce*, the First Circuit does not explain. The First Circuit does suggest that if *Pearce* applies to trial *de novo* review, then inferior courts might tend to give maximum sentences out of caution. 414 F.2d at 356. But this postulate is unreasonable. As the First Circuit itself notes, such a practice would simply encourage almost automatic exercise of the *de novo* appeal and the very recognition of this probability would be enough to deter the inferior courts from engaging in such a self-defeating practice.

The alternative evil which the First Circuit envisions is the shifting of all cases to the superior trial courts if the inferior courts persist in giving small penalties. This argument, too, is wholly without merit. It assumes, first that prosecutors or the state conceive of justice as being served only by the imposition of maximum sentences. If that were true, legislatures would not make provision for variable penalties and conscientious prosecutors would neither engage in plea bargaining nor even recommend lesser penalties to judges or juries. But law can be maintained as the source of social and economic order without securing maximum penalties in all or even a substantial portion of cases. Moreover, if the state finds the inferior

courts to be inadequate in their performance, it is the state that will correct that malfunction in the administration of justice. The courts should not speculate, to the disadvantage of criminal defendants, on what the state will deem to be inadequate performance.

Finally, it has been contended that application of *Pearce* to trial *de novo* appeals will unduly burden the trial courts of general jurisdiction. This argument in itself is an admission that the prospect of a higher penalty upon trial *de novo* conviction deters exercise of the right of appeal. Beyond this, however, experience does not support the fear of the added burden to the courts of general jurisdiction. For example, in declining to join in the brief of the State of North Carolina in *North Carolina* v. *Rice,* 40 U.S.L.W. 4073 (U.S. 1971), the Attorney General of Minnesota stated that experience with the *Pearce* policy in trial *de novo* appeals in that state had not resulted in an undue burden on the superior trial courts. See Brief of Respondent in *Rice,* No. 70-1325 at 20-21. Since 1968, New Mexico has operated its trial *de novo* appeal system under a statute prohibiting increased penalties apparently without suffering a resulting flood of appeals. Indeed, the majority of states do not utilize trial *de novo* appeals at all. Moreover, expediency has never justified denying due process.

D. *The Kentucky Court of Appeals Has Placed an Unconstitutional Price on the Right to Have a Fair Trial.*

The Kentucky Court of Appeals readily admits that it is placing a price on the appeal from the lower court's judgment. 467 S.W.2d at 379. Its explanation is that its trial *de novo* system merely provides the accused with an

election to appear before a court of general jurisdiction "rather than a court of convenience." *Ibid.* The price, it asserts, is placed on the "privilege of a choice of courts as distinguished from pricing the right to obtain a fair trial in one court which the state fixes as the sole forum." *Ibid.* But, the sole forum in which the accused's freedom is first placed in jeopardy in misdemeanor cases in Kentucky is normally the inferior court. By the Kentucky court's own admission, that is not a court in which the accused can be expected to obtain a fair trial. *Ibid.* Accordingly, the price affixed for appeal—being twice placed in jeopardy, being placed in fear of suffering a more severe penalty—is indeed placed on the right to obtain a fair trial and, therefore, is directly contrary to the most basic concept of procedural fairness. It is also the price of perfecting any appeal from constitutional trial error to any reviewing court, up to and including this Court.

E. *Increasing the Penalty on a Trial* De Novo *Appeal Violates the Prohibition Against Double Jeopardy.*

In *North Carolina* v. *Pearce;* 395 U.S. 711, the Court rejected the assertion that the 14th Amendment due process protection from double jeopardy protects against increased penalty at the retrial. The Court relied on a line of cases, commencing with *United States* v. *Ball,* 163 U.S. 662 and *Stroud* v. *United States,* 251 U.S. 15, in which the Court had previously rejected the double jeopardy protection as a barrier either to retrial of a defendant whose conviction was set aside due to error, or to imposition of a greater penalty on the second trial. 395 U.S. at 720-21. Justices Douglas, Harlan and Marshall would have found the double jeopardy protection violated in *Pearce.* 395 U.S. at 727, 745. Even if double jeopardy was not a proper barrier to

an increased penalty in *Pearce,* it is such a barrier here. In the instant case, the second trial is an exposure to jeopardy forced upon the defendant as the price for securing a constitutional hearing.

As previously noted, the Kentucky Court of Appeals has admitted that the hearings in its lower criminal courts do not meet constitutional standards. We can assume that that fact constitutes a major reason for adopting the rule providing for the automatic granting of a *de novo* trial. Under the Kentucky procedure, a defendant brought into an inferior criminal court must first run the gantlet of arrest, possible imprisonment, securing of bail, securing of counsel, preparation for defense or plea in the inferior court, appearance for trial before that court, and imposition of sentence. If the defendant is convicted but wishes to secure the benefits of a constitutional trial, he runs a second gantlet consisting of posting a supersedeas bond,[8] securing counsel, preparing for trial and appearing for trial before the court of general jurisdiction. A defendant who cannot secure bail or recognition is incarcerated while awaiting the retrial. Thus, contrary to the holding of *Green* v. *United States,* 355 U.S. 184, 190, the defendant is forced to run the gantlet twice. Unlike Pearce who chose a second trial to relieve himself from the burden of error at the first trial, the defendant in the *de novo* proceeding chooses the second trial as his first opportunity to receive due process of law irrespective of specific errors in the

[8] Ky. R. Cr. 12.02(1) requires posting a bond assuring payment of the costs of appeal and performance of the potential judgment on retrial. This is separate from the bail bond. In the instant case that appeal bond was set at $933.50 consisting of $500 for the potential fine, $360 for the potential six months' imprisonment, and $73.50 for court costs.

first trial. The defendant appealing for a *de novo* trial in Kentucky receives but one constitutionally cognizable trial under the decision below, yet he is twice subject to the burdens of making his defense and twice subject to punishment. To allow that punishment to be enhanced at the second trial is to penalize the defendant for the state's failure to provide an initial constitutional trial. But, the concept of the double jeopardy safeguard encompasses protecting a defendant from the state receiving two bites at the apple. *Downum* v. *United States,* 372 U.S. 734, 736; *Green* v. *United States,* 355 U.S. 184, 190; *Benton* v. *Maryland,* 395 U.S. 784, 796-97. Hence the double jeopardy clause bars increased penalties upon *de novo* appeals.

Moreover, the line of reasoning pursued by Mr. Justice Harlan in *Pearce* is fully applicable in the present situation respecting double jeopardy. In his separate opinion in *Pearce,* Mr. Justice Harlan noted that the double jeopardy rule was recognized in *Green* v. *United States,* 355 U.S. 184, to bar retrying a defendant on remand for a greater offense than the highest offense for which he was convicted at the first trial. Applying the reasoning of *Green,* Mr. Justice Harlan pointed out that the merits for protecting against jeopardy for a harsher offense on retrial are equally applicable respecting the imposition of a harsher penalty on retrial. 395 U.S. at 746. Further, as Mr. Justice Harlan stated: "It cannot be that the [double jeopardy] provision does not comprehend 'sentences'—as distinguished from 'offenses'—for it has long been established that once a prisoner commences service of sentence, the Clause prevents a court from vacating the sentence and then imposing a greater one." 395 U.S. at 747.

CONCLUSION

The judgment of the Kentucky Court of Appeals should be reversed and the case should be remanded for dismissal, on the grounds that the Disorderly Conduct statute as construed and as applied violates the Fourteenth Amendment. If this Court does not find the Disorderly Conduct statute unconstitutional, the judgment of the Kentucky court still should be vacated and the case remanded for a modification of the penalty in accordance with the rule of *North Carolina* v. *Pearce*, 395 U.S. 711.

Respectfully submitted,[9]

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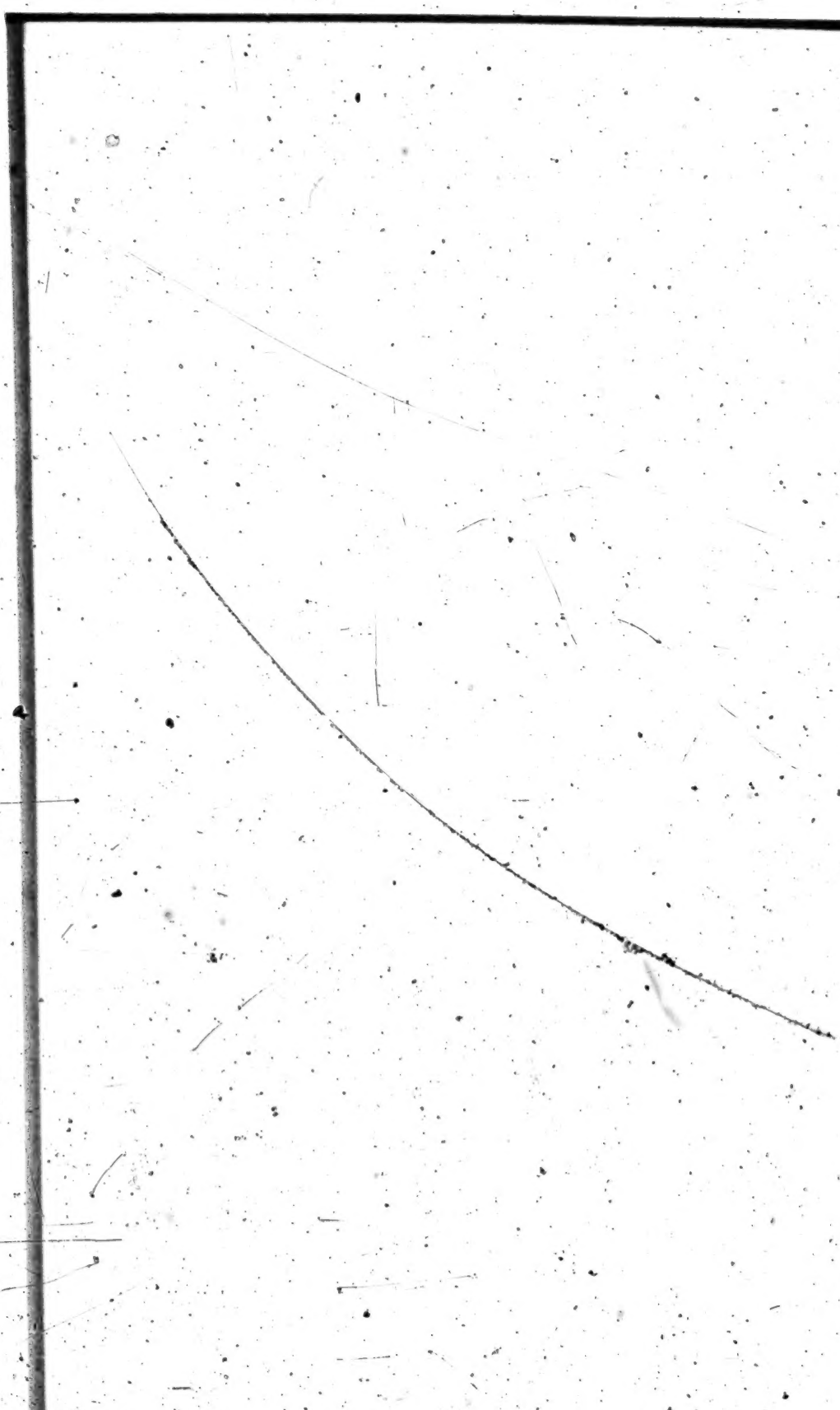
[9] Counsel are indebted to John W. Oakley and Brenda J. Hamer of the University of Kentucky College of Law, class of 1973, for assistance in preparing this brief.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-404

LEWIS COLTEN ---------- Appellant

vs.

COMMONWEALTH OF KENTUCKY ---------- Appellee

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

BRIEF FOR THE APPELLEE

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LEWIS COLTEN ..... *Appellant*

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COMMONWEALTH OF KENTUCKY ..... *Appellee*

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

BRIEF FOR THE APPELLEE

QUESTIONS PRESENTED FOR REVIEW

I. Is the Kentucky Disorderly Conduct Statute [KRS 437.016 (1) (f)] which provides "A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse," unconstitutional?

II. Does Kentucky's system of allowing a trial *de novo* in the Circuit Court (General Jurisdiction) from a judgment in Quarterly Court (Court of Limited Jurisdiction) chill the right to appeal and deprive one of any constitutional rights?

STATEMENT OF THE CASE

On March 3, 1970 appellant, *Lewis Colten*, was arrested at the Lexington Bluegrass Airport in Fayette County, Kentucky and charged with disorderly conduct under KRS 437.016. The Commonwealth believes that a brief resume' of the facts upon which *Colten* was adjudged guilty will be helpful to this court and enable it to see beyond the elaborate smoke screen which has been built up to hide the simple issue involved in this case.

Trooper *John R. Miller* of the Kentucky State Police, on March 3, 1970 at the Bluegrass Airport, directed a car driven by one *Guy Mendez* to pull over to the side of the road (App. 5). *Colten*, upon seeing this, pulled his car off the road and parked behind the trooper's car (App. 6, 45). *Colten* got out of his car and approached trooper *Miller* and proceeded to ask why the *Mendez* vehicle had been stopped (App. 6, 7) and was told that the vehicle had expired license plates and a traffic citation was going to be issued (App. 6). After this explanation, *Colten* was asked to go back to his car and clear the area (App. 7), but he refused to do so and kept interfering with trooper *Miller* (App. 7), finally necessitating *Miller's* return to his cruiser with *Mendez* in order to prepare the citation without *Colten's* interference (App. 7). By this time additional police cars and non-police cars arrived and proceeded to pull over, thereby creating a traffic problem (App. 16, 27, 34 - 36). The police officers attempted to clear up the traffic problem and disperse the crowd. Several officers told *Colten* to leave but he steadfastly refused to do so. Finally, Trooper *Harlowe* of the Kentucky State Police told *Colten* to leave and upon being informed that he *(Colten)* was going to stay around and see what happened (App. 35), *Harlowe* arrested *Colten* and charged him with disorderly conduct (App. 35).

Colten's trial in Fayette Quarterly Court on March 6, 1970 resulted in a finding of guilty and a fine of ten dollars plus costs. Upon a trial *de novo* in the Fayette Circuit Court on April 24,

1970, *Colten* was again found guilty and a fine of fifty dollars was imposed. The Kentucky Court of Appeals affirmed on May 21, 1971. It is from that judgment that this appeal is prosecuted.

SUMMARY OF ARGUMENT

I. Appellant has challenged the Kentucky Disorderly Conduct statute for overbreadth and/or vagueness. The contested statute, KRS 437.016 (1)(f), which states:

> "A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: congregates with other persons in a public place and refuses to comply with a lawful order of the polic to disperse."

clearly defines the conduct proscribed, *State* v. *Harriss,* 347 U.S. 612; *United States* v. *National Dairy Prod. Corp.*, 372 U.S. 29, and is not couched in such terms that men of common intelligence must necessarily guess at its meaning and application. *Connally* v. *General Construction Co.*, 269 U.S. 385.

Appellant further challenges the statute on the ground that it stifles freedom of speech and/or assembly. In order to challenge a statute on this ground, one must stand in the guard of the proper exercise of those freedoms. Appellant has no such standing. He was not engaging in any protected conduct and he was not convicted for any such conduct. Simply stated, he was convicted because he was guilty of disorderly conduct as proscribed by KRS 437.016 (1)(f).

II. The imposition of a greater punishment upon a trial *de novo* is not violative of any constitutional right. In a trial *de novo,* the accused and the government participate in a trial which has no reference to the plea, evidence, decision, judgment or sentence of the lower court. It is imperative that the state and the accused start at parity in the trial *de novo* and therefore a restriction as to the imposition of punishment cannot be put on the *de novo* forum.

ARGUMENT

I.

THE KENTUCKY DISORDERLY CONDUCT STATUTE [KRS 437.016 (1) (f)] WHICH PROVIDES "A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse," IS NOT UNCONSTITUTIONAL.

The application of the statute in the case at bar may be more clearly understood by dividing the statute into its three components.

First, was there an intent to cause public inconvenience or annoyance (or recklessly create a risk thereof)? The requisite intent is clearly evident by the fact that *Colten* stopped his car on a public road, creating a traffic hazard, and began questioning the police officer as to why the *Mendez* car had been stopped. *Colten* clearly intended to stop his car and clearly intended to question the officer. *Colten's* continued refusal to leave after being told to do so clearly shows his intent to disobey the lawful orders of the police. This, at the very least, created a risk of public inconvenience by causing traffic to congest.

Second, did *Colten* congregate with others in a public place? There was an abundance of testimony, from both sides, that a crowd was gathering (Appellant's brief, 7). In KRS 437.011 "public place" is defined and that definition includes "a place to which the public has access, and includes but is not limited to highways, * * *."

Lastly, did Colten fail to disperse upon a lawful order of the police? There is no question that Colten was asked and then told some nine or ten times to leave and that he continually refused.

Thus, it is readily apparent that appellant was not convicted because he was engaging in speech, dissemination of ideas, or peaceful assembly, but because the Fayette Quarterly Court found beyond a reasonable doubt that appellant was guilty of disorderly conduct. And as indicated in the lower court, the law under which he was convicted was not one regulating dissemination of ideas, but rather the offense of disorderly conduct. Under these circumstances, we do not believe the occasion is presented for this Court to consider the claim of overbreadth. See the discussions in *Dombrowski* v. *Phister*, 380 U.S. 479; *United States* v. *National Dairy Prod. Corp.*, 372 U.S. 29; *Thornhill v. Alabama*, 310 U.S. 88.

We believe this case is occasion for application of the rule that a person to whom application of a law is constitutional will not be held to attack it on the ground that it may be taken as applying to other persons or other situations. *United States v. Raines*, 362 U.S. 17.

By looking at the Fayette Quarterly Court decision, one can easily determine that appellant was convicted for failing to obey a lawful order of the police to disperse, not for engaging in any protected conduct.

> "I think on the basis of the testimony, and trying to weigh it completely, and listen carefully to all of it, that the Court will have to find that the defendant is guilty of the offense of disorderly conduct in his failure to leave the premises."

> "I think the evidence, as I say, is sufficient to find the defendant guilty of the disorderly conduct statute, which says that 'with intent to cause public inconvenience, annoyance or alarm, or recklessly creating the risk thereof,' he obstructs vehicular or pedestrian traffic, or 'congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse.'" Jurisdiction Statement 14a.

The trial court correctly conceived the issue when it stated" . . . so it comes down to the question and the single question, was there disorderly conduct by the defendant on this occasion." (Jurisdictional Statement 13a).

Appellant has based his objection to the Kentucky Disorderly Conduct statute on the grounds that it is so overly broad and/or vague that it stifles freedom of speech and assembly. As stated above, the question of stifling of freedom of speech and/or assembly, *as applied to the facts in this case*, is not present as *Colten* was not attempting to exercise either of these freedoms. Every case cited by appellant in support of an abrogation of freedom of speech involved a legitimate exercise of that freedom. A person attempting to disseminate ideas whether they be pro or con to the general beliefs of society is guaranteed his right to do so. *Colten* was not arrested for attempting to exercise his right to free speech, he was arrested because he refused to leave when he was told to do so. Likewise, all cases cited by appellant in support of freedom of assembly show a purpose for that assembly. Most, if not all, cases involving the freedom to assemble evidence a purpose for that assembly. People assemble to disseminate ideas to others or to demonstrate for or against someone or something. *Colten* stopped for the sole purpose of interfering with the police.

To apply appellant's logic would be to authorize any person to pull off the road behind a police car which had stopped a traffic violator and proceed to approach the police officer for the purpose of asking why he had stopped that particular car. This situation would seem ludicrous in the daylight but what would happen if it were 2:00 a.m. on a deserted country road and a policeman saw a strange vehicle pull up behind his cruiser and three or four people get out and start to approach him?

Or to pursue appeallant's logic to its extreme, would he permit an individual to approach an officer, engaged in a gun battle

with a bank robber, for the purpose of exercising his freedom of speech by asking the officer why he was shooting at that particular person?

There are certain times when first amendment rights must be regulated to insure the public order. See e.g. *United States* v. *O'Brien*, 391 U.S. 367; *Cox* v. *Louisiana*, 379 U.S. 536, where this court stated:

> "• • • The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. • • •" 379 U.S. 536 at 554.

The Kentucky Court of Appeals, in affirming the lower court held:

> "In the instant case the evidence warranted the conclusion that Colten was not undertaking to exercise any constitutionally protected freedom. He was not exercising the right of freedom of speech because that right is concerned with expression of thought or dissemination of idea. See Smith v. California, 361 U.S. 147, 80 S. Ct. 215, 4 L.ed.2d 205. Colten was not seeking to express a thought to any listener or to disseminate any idea. He simply was trying to irritate the police by his presence and by efforts at interruption. Nor was he exercising the right of peaceable assembly, because that right, we believe, contemplates that the assembly is for some *bona fide* purpose other than merely to assemble, and Colten's group appears to have had no purpose other than to cause inconvenience, and annoyance so the statute as applied here did not chill or stifle the exercise of any constitutional right." 467 S.W.2d at 378.

The Commonwealth submits that under certain circumstances first amendment rights to free speech and assembly must be subjected to regulation to maintain the public order and tranquility. See e.g. *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308; discussions in *Edwards* v. *South Carolina*, 372 U.S. 229; *Cameron* v. *Johnson*, 390 U.S. 611.

This necessary regulation is what the Kentucky Court of Appeals applied when it mentioned the balancing of interests. Appellant has placed great reliance on the language of the Court and by applying this language out of context, completely twisted around the holding of the Kentucky Court. By a simple insertion of the facts of this case into the language of the Kentucky Court, one can achieve miraculous clarification:

> "• • • where the interest which the individual seeks to advance *(i.e. Colten's repeated attempts to interfere with the police)* through exercise of freedom of speech is minuscule in comparison with the public's interest in being protected from the consequences of that exercise *(i.e. traffic congestion)*, the public's interest should prevail even though the harm the public might be exposed to is no more than inconvenience or annoyance *(i.e. — being tied up in traffic for awhile)*." 467 S.W.2d 377 *insertions added*

The balancing concept must be carried a bit farther in this case. It is uncontroverted that *Colten* asked the policeman why he had stopped the *Mendez* vehicle. *Colten* recevied a specific answer from the trooper. Somewhere between this exchange of questions and answers and *Coltens'* arrest, his freedom of speech invaded the rights of the public. If Colten had merely asked the officer this question, returned to his car and not caused a crowd to gather and obstruct traffic, the Commonwealth might well agree that he was participating in protected conduct, but he was neither arrested nor convicted for engaging in any protected conduct. However, continued persistence in remaining in a place which had become a traffic problem after being told to leave eight

or ten times certainly removed Colten from the protectiveness of his first amendment rights. In other words, Colten's own conduct tipped the balance against him.

II.

KENTUCKY'S SYSTEM OF ALLOWING A TRIAL DE NOVO IN THE CIRCUIT COURT (General Jurisdiction) FROM A JUDGMENT IN QUARTERLY COURT (Court of Limited Jurisdiction) DOES NOT CHILL THE RIGHT TO APPEAL AND DEPRIVE ONE OF ANY CONSTITUIONAL RIGHTS.

Appellant's argument that an increase in punishment upon a trial *de novo* is unconstitutional is based upon *North Carolina* v. *Pearce*, 395 U.S. 711. It is readily apparent from the *Pearce* opinion that it was not intended to apply to a trial *de novo*. The language of this Court illustrates this:

> "the constitutional limitations upon the imposition of a more severe punishment after conviction for the same offense upon *retrial*." 395 U.S. at 716.
>
> "what constitutional limitations there may be upon the general power of a judge to impose upon a *reconviction* a longer prison sentence . . ." 395 U.S. at 719.
>
> "a man who is *retried* after his first conviction has been set aside. . ." 395 U.S. at 722.

Thus, *Pearce* is applicable only where a person receives a reversal of his case and is retried. There is no chance of this even happening in the trial *de novo* situation. An appeal connotes that the judgment is prosecuted to a higher court in order to determine if the lower court's judgment was correct in both the application of the law and conduct of the trial.

When a trial *de novo* is obtained, nothing that occurred in the Quarterly Court is available to the Circuit Court. A trial *de novo* is a matter of right and is entirely independent of the decision below. The Commonwealth cannot seek a trial *de novo;* the defendant must actively request it. Indeed, a person can plead guilty in Quarterly Court and turn right around and seek trial *de novo* in the Circuit Court and enter a plea of not guilty.*

One does not have to stretch the imagination too far to conceive of the situation where a defendant enters a plea of guilty in the Quarterly Court, offers mitigating circumstances, and receives a suspended sentence and/or fine. This same defendant could then walk out the door, around the corner, and file for a trial *de novo*. He could then plead not guilty and request a jury trial. To follow appellant's logic would dictate that if he was again found guilty, he could receive nothing more than suspended punishment. This example is entirely within the realm of possibility and would occur if *Pearce* was held to include a *de novo* trial.

The first Circuit Court of Appeals has held that an increase in punishment following a trial *de novo* is not violative of *Pearce*. *Lemieux* v. *Robbins*, 414 F.2d 353 (1st Cir. 1969) cert. denied, 397 U.S. 1017 (1970). The fourth Circuit has held that *Pearce* is applicable: *Rice* v. *North Carolina*, 434 F.2d 297 (4th Cir. 1970), reversed on other grounds 30 L.ed. 2d 413 (1972).

In *Mann* v. *Commonwealth*, 271 N.E.2d 331 (Mass. 1971), the Supreme Judicial Council of Massachusetts presented an excellent discussion of why a superior court must possess the right to impose a heavier sentence upon trial *de novo*. See also *Evans* v. *City of Richmond*, 171 S.E.2d 247 (1969).

*Under Kentucky law one can plead guilty in a Quarterly Court and still obtain a trial *de novo*, as a matter of right, in the Circuit Court *Brown v. Hoblitzell*, Ky., 307 S.W.2d 739, (1956).

Our research indicates that presently twenty states provide a trial *de novo* system similar to the one in Kentucky.[1]

The trial *de novo* system serves an important function in our judiciary system in that it allows one to proceed in a court of limited jurisdiction or a court of *convenience*. There are thousands of people every day who have such cases as traffic offenses and misdemeanors and wish to expediently conclude their minor brush with the law. However, if a person feels that he was wronged or didn't get a fair shake in the lower court, he can have a *de novo* trial in the court of general jurisdiction. As stated previously, this *de novo* trial is entirely independent of the lower court's judgment. But if the *de novo* trial were restricted in the application of punishment it would cease to exist. This would work a serious hardship both upon the public and the judiciary system.

[1]ARIZONA—A.R.S. § 22-374; ARKANSAS—Ark. Stat. §§§ 44-501; 502 and 509; COLORADO—Rule 37 (f) COLO. Rules of Crim. Pro.; FLORIDA—Constitution of Florida, Art. V, §§ 11(2) and 6(3). See also F.S.A. §§§§ 932.53, 54, 55 and 56; INDIANA—Burns' Ind. Stat. Ann. § 9-721. See also PEELE v. STATE, 161 Ind. 378, 68 N.E. 682, and HARLAN v. State, 190 Ind. 332, 130 N.E. 413; KANSAS—K.S.A. § 22-3610. See also STATE v. COULTER, 40 Kan. 87, 19 P. 368 (1888), and STATE v. FORNER, 32 Kan. 281, 4 P. 357 (1884); KENTUCKY—K.R.S. § 23.032 and Rule 12.06 Ky. Rules of Crim. Pro. See also DRESSMAN v. COMMONWEALTH, 204 Ky. 668, 265 S.W. 3 (1924); MAINE—Me. Rules of Crim. Pro., Dist. Ct. Rules 37(a) and 39(a), (b) and (c). See also LEMIEUX v. MAINE, 240 A. 2d 206 (Me. 1968) and LEMIEUX v. ROBBINS, 414 F.2d 353 (1st Cir. 1969), cert. dnd. 397 U.S. 1017 (1970); MICHIGAN—PEOPLE v. OLARY, 382 Mich. 559, 170 N.W. 2d 842 (1969); MISSISSIPPI—Miss. Code §§ 1201 and 1202; MISSOURI—Supreme Court Rule 22 §§ 10 and 11; MONTANA—R.C.M. § 95-2009. WHITE SULPHUR SPRINGS v. VOISE, 136 Mont. 1, 343 P.2d 855 (1959); NEVADA—Rule 76 Justices' Court Pro.; NEW HAMPSHIRE—STATE v. DESPRES, 107 N.H. 297, 220 A.2d 758 (1966). See also N.H.R.S.A. §§§ 502.18, 502A:11 and 12, and 599:1; NORTH CAROLINA—N.C.G.S. §§ 15-177, 177.1, STATE v. BROOM, 153 S.E.2d 384 (1967); NORTH DAKOTA—N.D. Cent. Code §§ 33-12-40 and 41; TEXAS—Vernon's Ann. Code of Crim. Pro. §§ 44.17 and 45.10; UTAH—Utah Code Ann. §§ 78-4-17 and 78-5-14. See also Utah Code Ann. §§ 77-57-43 and 77-27-2; VIRGINIA—Va. Code § 16.1-136. See also EVANS v. CITY OF RICHMOND, 210 Va. 403, 171 S.E. 2d 247 (1969); WEST VIRGINIA—Constitution of W. Va., Article VII, § 28. See also W. Va. Code §§ 50-18-1 and 50-18-10 STATE v. KESSINGER, 144 W. Va. 209, 107 S.E. 2d 367 (1959).

In regard to the claim of double jeopardy, the Commonwealth submits that where a defendant pursues his right to a trial *de novo,* he starts anew as if there had never been a previous trial, and therefore the argument of double jeopardy, applied to the facts in this case, is without merit.

CONCLUSION

The decision of the Kentucky Court of Appeals should be affirmed for two reasons. One, Lewis Colten was found guilty of disorderly conduct. He was not convicted because he was engaging in any protected conduct, but because he congregated with others in a public place, causing a traffic hazard, and refused to obey a lawful order of the police to leave.

Two, the trial *de novo* system of justice plays an important role in our judiciary. It is imperative that the state and the defendant start at parity at such a trial and therefore the *de novo* trial court cannot be restricted in its application of punishment.

Respectfully submitted,

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COLTEN *v.* KENTUCKY

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

No. 71–404. Argued April 17, 1972—Decided June 12, 1972

Appellant, arrested for disorderly conduct when he failed, notwithstanding several requests by an officer, to leave a congested roadside where a friend in another car was being ticketed for a traffic offense, was tried and convicted in an inferior court and fined $10. Kentucky has a two-tier system for adjudicating certain criminal cases, under which a person charged with a misdemeanor may be tried first in an inferior court and, if dissatisfied with the outcome, may have a trial *de novo* in a court of general criminal jurisdiction but must risk a greater punishment if convicted. Exercising his right to a trial *de novo*, appellant was tried for disorderly conduct in the circuit court, convicted, and fined $50. The state appellate court affirmed, rejecting appellant's contention that the disorderly conduct statute is unconstitutional under the First and Fourteenth Amendments and that the greater punishment contravened the due process requirements of *North Carolina* v. *Pearce*, 395 U. S. 711, and violated the Fifth Amendment's Double Jeopardy Clause. The disorderly conduct statute makes it an offense for a person with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, to congregate with others in a public place and refuse to comply with a lawful police dispersal order. As construed by the Kentucky Court of Appeals, a violation occurs only where there is no bona fide intention to exercise a constitutional right or where the interest to be advanced by the individual's exercise of the right is insignificant in comparison to the inconvenience, annoyance, or alarm caused by his action. *Held:*

1. The disorderly conduct statute was not unconstitutionally applied, there having been ample evidence that the action of appellant, who had no constitutional right to observe the ticketing process or engage the issuing officer in conversation, was interfering with enforcement of traffic laws. Pp. 108–110.

2. The statute is not impermissibly vague or broad as "citizens who desire to obey [it] will have no difficulty in understanding it," and, as construed by the Kentucky court, individuals may not be convicted thereunder merely for expressing unpopular ideas. Pp. 110–111.

3. Kentucky's two-tier system does not violate the Due Process Clause, as it imposes no penalty on those who seek a trial *de novo* after having been convicted in the inferior court. The Kentucky procedure involves a completely fresh determination of guilt or innocence by the superior court which is not the court that acted on the case before and has no motive to deal more strictly with a *de novo* defendant than it would with any other. *North Carolina* v. *Pearce*, *supra*, distinguished. Pp. 112–119.

4. The Double Jeopardy Clause does not prohibit an enhanced sentence on reconviction. *North Carolina* v. *Pearce*, *supra*, at 719–720. Pp. 119–120.

467 S. W. 2d 374, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., *post*, p. 120, and MARSHALL, J., *post*, p. 122, filed dissenting opinions.

Alvin L. Goldman argued the cause for appellant. With him on the brief were *Melvin L. Wulf* and *Sanford Jay Rosen*.

Robert W. Willmott, Jr., Assistant Attorney General of Kentucky, argued the cause for appellee *pro hac vice*. With him on the brief was *Ed W. Hancock*, Attorney General.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents two unrelated questions. Appellant challenges his Kentucky conviction for disorderly conduct on the ground that the conviction and the State's statute are repugnant to the First and Fourteenth Amendments. He also challenges the constitutionality of the enhanced penalty he received under Kentucky's two-tier system for adjudicating certain criminal cases, whereby a person charged with a misdemeanor may be tried first in an inferior court and, if dissatisfied with the outcome, may have a trial *de novo* in a court of general

criminal jurisdiction but must run the risk, if convicted, of receiving a greater punishment.

Appellant Colten and 15 to 20 other college students gathered at the Blue Grass Airport outside Lexington, Kentucky, to show their support for a state gubernatorial candidate and to demonstrate their lack of regard for Mrs. Richard Nixon, then about to leave Lexington from the airport after a public appearance in the city. When the demonstration had ended, the students got into their automobiles and formed a procession of six to 10 cars proceeding along the airport access road to the main highway. A state policeman, observing that one of the first cars in the entourage carried an expired Louisiana license plate, directed the driver, one Mendez, to pull off the road. He complied. Appellant Colten, followed by other motorists in the procession, also pulled off the highway, and Colten approached the officer to find out what was the matter. The policeman explained that the Mendez car bore an expired plate and that a traffic summons would be issued. Colten made some effort to enter into a conversation about the summons. His theory was that Mendez may have received an extension of time in which to obtain new plates. In order to avoid Colten and to complete the issuance of the summons, the policeman took Mendez to the patrol car. Meanwhile, other students had left their cars and additional policemen, having completed their duties at the airport and having noticed the roadside scene, stopped their cars in the traffic lane abreast of the students' vehicles. At least one officer took responsibility for directing traffic, although testimony differed as to the need for doing so. Testimony also differed as to the number of policemen and students present, how many students left their cars and how many were at one time or another standing in the roadway. A state police captain asked on four or five occasions that the group disperse. At least five times

police asked Colten to leave.[1] A state trooper made two requests, remarking at least once: "Now, this is none of your affair . . . get back in your car and please move on and clear the road." In response to at least one of these requests Colten replied that he wished to make a transportation arrangement for his friend Mendez and the occupants of the Mendez car, which he understood was to be towed away. Another officer asked three times that Colten depart and when Colten failed to move away he was arrested for violating Kentucky's disorderly conduct statute, Ky. Rev. Stat. § 437.016 (Supp. 1968). The arresting officer testified that Colten's response to the order had been to say that he intended to stay and see what might happen. Colten disputed this. He testified that he expressed a willingness to leave but wanted first to make a transportation arrangement. At trial he added that he feared violence on the part of the police.[2]

The complaint and warrant charging disorderly conduct, which carries a maximum penalty of six months in jail and a fine of $500, were addressed to the Quarterly

[1] This version of the facts is taken largely from the opinion of the Kentucky Court of Appeals. *Colten* v. *Commonwealth*, 467 S. W. 2d 374, 375–376 (Ky. 1971). Colten testified that only the arresting officer ordered him to leave and that the three orders were uttered in such rapid succession that he had little opportunity to comply. App. 49–51. This was disputed by a policeman who testified that earlier he twice asked appellant to leave and gave the admonition quoted in the text. *Id.*, at 23–24. Our own examination of the record indicates that the Kentucky courts' resolution of this factual dispute was a fair one. Cf. *Cox* v. *Louisiana*, 379 U. S. 536, 545 n. 8 (1965).

[2] In his brief appellant makes a passing reference to the possibility of violence on the part of police and suggests that he remained on the scene to avert misdeeds or to be a potential witness to them. Yet he builds no factual basis for a reasonable apprehension of violence and seemingly dispels whatever force such a contention might have when he states in his brief: "In the overwhelming majority of cases, that suspicion [of police brutality] is undoubtedly wrong, but it is there." Brief for Appellant 36.

Court of Fayette County, where Colten was tried, convicted, and fined $10. Exercising his right to a trial *de novo* in a court of general jurisdiction, Colten "appealed," as the Kentucky rules style this recourse, Ky. Rule Crim. Proc. 12.02, to the Criminal Division of the Fayette Circuit Court. By consent, trial was to the court and Colten was convicted of disorderly conduct and this time fined $50. The Kentucky Court of Appeals affirmed. *Colten* v. *Commonwealth*, 467 S. W. 2d 374 (Ky. 1971). It rejected Colten's constitutional challenges to the statute and his claim that the punishment imposed was impermissible, under *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). We noted probable jurisdiction. 404 U. S. 1014 (1972).

I

Colten was convicted of violating Ky. Rev. Stat. § 437.016 (1)(f) (Supp. 1968), which states:

> "(1) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> . . . . . .
>
> "(f) Congregates with other persons in a public place, and refuses to comply with a lawful order of the police to disperse . . . ."

The Kentucky Court of Appeals interpreted the statute in the following way:

> "As reasonably construed, the statute does not prohibit the lawful exercise of any constitutional right. We think that the plain meaning of the statute, in requiring that the proscribed conduct be done 'with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof,' is that the specified intent must be the *predominant* intent. Predominance can be determined either (1) from the fact that no bona fide intent to exercise a constitu-

tional right appears to have existed or (2) from the fact that the interest to be advanced by the particular exercise of a constitutional right is insignificant in comparison with the inconvenience, annoyance or alarm caused by the exercise." 467 S. W. 2d, at 377.

The evidence warranted a finding, the Kentucky court concluded, that at the time of his arrest, "Colten was not undertaking to exercise any constitutionally protected freedom." Rather, he "appears to have had no purpose other than to cause inconvenience and annoyance. So the statute as applied here did not chill or stifle the exercise of any constitutional right." *Id.*, at 378.

Based on our own examination of the record, we perceive no justification for setting aside the conclusion of the state court that when arrested appellant was not engaged in activity protected by the First Amendment. Colten insists that in seeking to arrange transportation for Mendez and in observing the issuance of a traffic citation he was disseminating and receiving information. But this is a strained, near-frivolous contention and we have little doubt that Colten's conduct in refusing to move on after being directed to do so was not, without more, protected by the First Amendment. Nor can we believe that Colten, although he was not trespassing or disobeying any traffic regulation himself, could not be required to move on. He had no constitutional right to observe the issuance of a traffic ticket or to engage the issuing officer in conversation at that time. The State has a legitimate interest in enforcing its traffic laws and its officers were entitled to enforce them free from possible interference or interruption from bystanders, even those claiming a third-party interest in the transaction. Here the police had cause for apprehension that a roadside strip, crowded with persons and automobiles, might expose the entourage, passing motorists, and police to the risk of accident. We cannot disagree with the finding

below that the order to disperse was suited to the occasion. We thus see nothing unconstitutional in the manner in which the statute was applied.

II

Neither are we convinced that the statute is either impermissibly vague or broad. We perceive no violation of "[t]he underlying principle . . . that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U. S. 612, 617 (1954); cf. *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926). Here the statute authorized conviction for refusing to disperse with the intent of causing inconvenience, annoyance, or alarm. Any person who stands in a group of persons along a highway where the police are investigating a traffic violation and seeks to engage the attention of an officer issuing a summons should understand that he could be convicted under subdivision (f) of Kentucky's statute if he fails to obey an order to move on. The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. We agree with the Kentucky court when it said: "We believe that citizens who desire to obey the statute will have no difficulty in understanding it . . . ." *Colten* v. *Commonwealth*, 467 S. W. 2d, at 378.

Colten also argues that the Kentucky statute is overbroad. He relies on *Cox* v. *Louisiana*, 379 U. S. 536 (1965), where the Court held unconstitutional a breach-of-peace statute construed to forbid causing agitation or

disquiet coupled with refusing to move on when ordered to do so. The Court invalidated the statute on the ground that it permitted conviction where the mere expression of unpopular views prompted the order that is disobeyed. Colten argues that the Kentucky statute must be stricken down for the same reason.

As the Kentucky statute was construed by the state court, however, a crime is committed only where there is no bona fide intention to exercise a constitutional right—in which event, by definition, the statute infringes no protected speech or conduct—or where the interest so clearly outweighs the collective interest sought to be asserted that the latter must be deemed insubstantial. The court hypothesized, for example, that one could be convicted for disorderly conduct if at a symphony concert he arose and began lecturing to the audience on leghorn chickens. 467 S. W. 2d, at 377. In so confining the reach of its statute, the Kentucky court avoided the shortcomings of the statute invalidated in the *Cox* case. Individuals may not be convicted under the Kentucky statute merely for expressing unpopular or annoying ideas. The statute comes into operation only when the individual's interest in expression, judged in the light of all relevant factors, is "minuscule" compared to a particular public interest in preventing that expression or conduct at that time and place. As we understand this case, appellant's own conduct was not immune under the First Amendment and neither is his conviction vulnerable on the ground that the statute threatens constitutionally protected conduct of others.[3]

[3] Appellant attacks on overbreadth grounds other subsections of the disorderly conduct statute, such as those that prohibit the making of an "unreasonable noise" and the use of "abusive or obscene language." Ky. Rev. Stat. §§ 437.016 (b); (c) (Supp. 1968). But Colten was not convicted of violating these subsections and they are not properly before us in this case.

III

Kentucky, like many other States,[4] has a two-tier system for adjudicating less serious criminal cases. In Kentucky, at the option of the arresting officer, those crimes classified under state law as misdemeanors[5] may be charged and tried in a so-called inferior court,[6] where, as in the normal trial setting, a defendant may choose to have a trial or to plead guilty. If convicted after trial or on a guilty plea, however, he has a right to a trial *de novo* in a court of general criminal jurisdiction, *Brown* v. *Hoblitzell*, 307 S. W. 2d 739 (Ky. 1957), so

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[4] *E. g.*, Ariz. Rev. Stat. Ann. § 22–371 *et seq.* (1956 and Supp. 1971–1972); Ark. Stat. Ann. § 44–501 *et seq.* (1964); Colo. Rule Crim. Proc. 37 (f); Fla. Stat. Ann. § 924.41 *et seq.* (Supp. 1972–1973); Ind. Ann. Stat. § 9–713 *et seq.* (1956 and Supp. 1971); Kan. Stat. Ann. § 22–3610 *et seq.* (Supp. 1971); Me. Dist. Ct. Crim. Rule 37 *et seq.*; Md. Ann. Code, Art. 5, § 43 (1968); Mich. Stat. Ann. § 28.1226 (Supp. 1972); Minn. Stat. §§ 488.20, 633.20 *et seq.* (1969); Miss. Code Ann. §§ 1201, 1202 (Supp. 1971); Mo. Sup. Ct. Rule 22; Mont. Rev. Codes Ann. § 95–2001 *et seq.* (1947); Neb. Rev. Stat. § 29–601 *et seq.* (1964); Nev. Rev. Stat. § 189.010 *et seq.* (1969); N. H. Rev. Stat. Ann. §§ 502:18, 502–A:11–12 (1968); N. M. Stat. Ann. § 36–15–1 *et seq.* (Supp. 1971); N. C. Gen. Stat. §§ 15–177 *et seq.*, 20–138 (1965 and Supp. 1971); N. D. Cent. Code § 33–12–40 *et seq.* (1960); Pa. Stat. Ann. Tit. 42, § 3001 *et seq.* (Supp. 1972–1973); Pa. Const., Sched. Art. 5, § 16 (r)(iii) (Philadelphia); Tex. Code Crim. Proc., Arts. 44.17, 45.10 (1966); Va. Code Ann. § 16.1–129 *et seq.* (1950); Wash. Rev. Code § 3.50.380 *et seq.* (Supp. 1971); W. Va. Code Ann. § 50–18–1 *et seq.* (1966 and Supp. 1971).

[5] Misdemeanors are defined as those crimes punishable by a maximum of one year in jail and a $500 fine. Ky. Rev. Stat. §§ 25.010, 26.010 (1962 and Supp. 1968).

[6] What the Kentucky Court of Appeals calls inferior courts include county, quarterly, justice's and police courts. In all cases in which the punishment is limited to a fine of $20, the inferior courts have original jurisdiction. Ky. Rev. Stat. § 26.010 (1962). In all other misdemeanor cases their jurisdiction is concurrent with that of the circuit courts.

long as he applies within the statutory time.[7] The right to a new trial is absolute. A defendant need not allege error in the inferior court proceeding. If he seeks a new trial, the Kentucky statutory scheme contemplates that the slate be wiped clean. Ky. Rule Crim. Proc. 12.06. Prosecution and defense begin anew. By the same token neither the judge nor jury that determines guilt or fixes a penalty in the trial *de novo* is in any way bound by the inferior court's findings or judgment. The case is to be regarded exactly as if it had been brought there in the first instance. A convicted defendant may seek review in the state appellate courts in the same manner as a person tried initially in the general criminal court. Ky. Rev. Stat. § 23.032 (Supp. 1968). However, a defendant convicted after a trial or plea in an inferior court may not seek ordinary appellate review of the inferior court's ruling. His recourse is the trial *de novo*.

While by definition two-tier systems throughout the States have in common the trial *de novo* feature,[8] there are differences in the kind of trial available in the inferior courts of first instance, whether known as county, municipal, police, or justice of the peace courts, or are otherwise referred to. Depending upon the jurisdiction and offense charged, many such systems provide as complete protection for a criminal defendant's constitutional rights as do courts empowered to try more serious crimes. Others, however, lack some of the safeguards provided in more serious criminal cases. Although appellant here was entitled to a six-man jury, cf. *Williams v. Florida*, 399 U. S. 78 (1970), which he waived, some

[7] Ky. Rev. Stat. § 23.032 (Supp. 1968). Kentucky denominates an application for a trial *de novo* an "appeal." However, the right to a new trial is unconditional and exists even when a defendant seeks redetermination of questions of law. Ky. Rules Crim. Proc. 12.02, 12.06.

[8] A general discussion of how these courts operate may be found in 47 Am. Jur. 2d, Justices of the Peace §§ 49–120.

States do not provide for trial by jury,[9] even in instances where the authorized punishment would entitle the accused to such tribunal. Cf. *Duncan* v. *Louisiana*, 391 U. S. 145 (1968). Some, including Kentucky, do not record proceedings[10] and the judges may not be trained for their positions either by experience or schooling.[11]

Two justifications are asserted for such tribunals: first, in this day of increasing burdens on state judiciaries, these courts are designed, in the interest of both the defendant and the State, to provide speedier and less costly adjudications than may be possible in the criminal courts of general jurisdiction where the full range of constitutional guarantees is available; second, if the defendant is not satisfied with the results of his first trial he has the unconditional right to a new trial in a superior court, unprejudiced by the proceedings or the outcome in the inferior courts. Colten, however, considers the Kentucky system to be infirm because the judge in a trial *de novo* is empowered to sentence anew and is not bound to stay within the limits of the sentence imposed by the inferior court. He bases his attack both on the Due Process Clause, as interpreted in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), and on the Fifth Amendment's Double Jeopardy Clause. The

[9] *E. g.*, Massachusetts, North Carolina, Pennsylvania. *Mann* v. *Commonwealth*, — Mass. —, 271 N. E. 2d 331 (1971); *State* v. *Spencer*, 276 N. C. 535, 173 S. E. 2d 765 (1970); Pa. Stat. Ann., Tit. 42, § 3001 *et seq.* (Supp. 1972–1973); Pa. Const., Sched. Art. 5, § 16 (r) (iii) (Philadelphia).

[10] *E. g.*, North Carolina, Virginia. *State* v. *Sparrow*, 276 N. C. 499, 173 S. E. 2d 897 (1970); *Evans* v. *City of Richmond*, 210 Va. 403, 171 S. E. 2d 247 (1969).

[11] See, *e. g.*, *People* v. *Olary*, 382 Mich. 559, 170 N. W. 2d 842 (1969); *State* v. *DeBonis*, 58 N. J. 182, 276 A. 2d 137 (1971). However, the trial judge in the Fayette Quarterly Court, where Colten was tried, is a professional.

issues appellant raises have produced a division among the state courts that have considered them [12] as well as a conflict among the federal circuits.[13]

Colten rightly reads *Pearce* to forbid, following a successful appeal and reconviction, the imposition of a greater punishment than was imposed after the first trial, absent specified findings that have not been made here. He insists that the *Pearce* rule is applicable here and that there is no relevant difference between the *Pearce* model and the Kentucky two-tier trial *de novo* system. Both, he asserts, involve reconviction and resentencing, both provide the convicted defendant with the right to "appeal" and in both—even though under the Kentucky scheme the "appeal" is in reality a trial *de novo*—a penalty for the same crime is fixed twice, with the same potential for an increased penalty upon a successful "appeal."

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[12] *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), applies: *Bronstein* v. *Superior Court*, 106 Ariz. 251, 475 P. 2d 235 (1970); *State* v. *Shak*, 51 Haw. 626, 466 P. 2d 420 (1970); *Eldridge* v. *State*, — Ind. —, 267 N. E. 2d 48 (1971); *Cherry* v. *State*, 9 Md. App. 416, 264 A. 2d 887 (1970); *Commonwealth* v. *Harper*, 219 Pa. Super. 100, 280 A. 2d 637 (1971).

Contra: Mann v. *Commonwealth*, — Mass. —, 271 N. E. 2d 331 (1971); *People* v. *Olary*, 382 Mich. 559, 170 N. W. 2d 842 (1969); *State* v. *Stanosheck*, 186 Neb. 17, 180 N. W. 2d 226 (1970); *State* v. *Sparrow*, 276 N. C. 499, 173 S. E. 2d 897 (1970); *Evans* v. *City of Richmond*, 210 Va. 403, 171 S. E. 2d 247 (1969).

New Mexico prohibits enhanced sentencing altogether. N. M. Stat. Ann. § 36-15-3 (Supp. 1971).

[13] *Pearce* applies: *Rice* v. *North Carolina*, 434 F. 2d 297 (CA4 1970), vacated and remanded on ground of possible mootness, 404 U. S. 244 (1971); *contra: Lemieux* v. *Robbins*, 414 F. 2d 353 (CA1 1969), cert. denied, 397 U. S. 1017 (1970). See also *Manns* v. *Allman*, 324 F. Supp. 1149 (WD Va. 1971), holding that *Pearce* does not apply where an enhanced penalty is imposed by a jury rather than a judge.

But *Pearce* did not turn simply on the fact of conviction, appeal, reversal, reconviction, and a greater sentence. The court was there concerned with two defendants who, after their convictions had been set aside on appeal, were reconvicted for the same offenses and sentenced to longer prison terms. In one case the term was increased from 10 to 25 years. Positing that a more severe penalty after reconviction would violate due process of law if imposed as purposeful punishment for having successfully appealed, the court concluded that such untoward sentences occurred with sufficient frequency to warrant the imposition of a prophylactic rule to ensure "that vindictiveness against a defendant for having successfully attacked his first conviction . . . [would] play no part in the sentence he receives after a new trial . . . ." and to ensure that the apprehension of such vindictiveness does not "deter a defendant's exercise of the right to appeal or collaterally attack his first conviction . . . ." 395 U. S., at 725.

Our view of the Kentucky two-tier system of administering criminal justice, however, does not lead us to believe, and there is nothing in the record or presented in the briefs to show, that the hazard of being penalized for seeking a new trial, which underlay the holding of *Pearce*, also inheres in the *de novo* trial arrangement. Nor are we convinced that defendants convicted in Kentucky's inferior courts would be deterred from seeking a second trial out of fear of judicial vindictiveness. The possibility of vindictiveness, found to exist in *Pearce*, is not inherent in the Kentucky two-tier system.

We note first the obvious: that the court which conducted Colten's trial and imposed the final sentence was not the court with whose work Colten was sufficiently dissatisfied to seek a different result on appeal; and it

is not the court that is asked to do over what it thought it had already done correctly. Nor is the *de novo* court even asked to find error in another court's work. Rather, the Kentucky court in which Colten had the unrestricted right to have a new trial was merely asked to accord the same trial, under the same rules and procedures, available to defendants whose cases are begun in that court in the first instance. It would also appear that, however understandably a court of general jurisdiction might feel that the defendant who has had a due process trial ought to be satisfied with it, the *de novo* court in the two-tier system is much more likely to reflect the attitude of the Kentucky Court of Appeals in this case when it stated that "the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses." *Colten* v. *Commonwealth*, 467 S. W. 2d, at 379. We see no reason, and none is offered, to assume that the *de novo* court will deal any more strictly with those who insist on a trial in the superior court after conviction in the Quarterly Court than it would with those defendants whose cases are filed originally in the superior court and who choose to put the State to its proof in a trial subject to constitutional guarantees.

It may often be that the superior court will impose a punishment more severe than that received from the inferior court. But it no more follows that such a sentence is a vindictive penalty for seeking a superior court trial than that the inferior court imposed a lenient penalty. The trial *de novo* represents a completely fresh determination of guilt or innocence. It is not an appeal on the record. As far as we know, the record from the lower court is not before the superior court and is irrelevant

to its proceedings. In all likelihood, the trial *de novo* court is not even informed of the sentence imposed in the inferior court and can hardly be said to have "enhanced" the sentence.[14] In Kentucky, disorderly conduct is punishable by six months in jail and a fine of $500. The inferior court fined Colten $10, the trial *de novo* court $50. We have no basis for concluding that the latter court did anything other than invoke the normal processes of a criminal trial and then sentence in accordance with the normal standards applied in that court to cases tried there in the first instance. We cannot conclude, on the basis of the present record or our understanding, that the prophylactic rule announced in *Pearce* is appropriate in the context of the system by which Kentucky administers criminal justice in the less serious criminal cases.

It is suggested, however, that the sentencing strictures imposed by *Pearce* are essential in order to minimize an asserted unfairness to criminal defendants who must endure a trial in an inferior court with less-than-adequate protections in order to secure a trial comporting completely with constitutional guarantees. We are not persuaded, however, that the Kentucky arrangement for dealing with the less serious offenses disadvantages defendants any more or any less than trials conducted in a court of general jurisdiction in the first instance, as long as the latter are always available. Proceedings in the inferior courts are simple and speedy, and, if the results in Colten's case are any evidence, the penalty is not characteristically severe. Such proceedings offer a defendant the opportunity to learn about the prosecution's case and, if he chooses, he need not reveal his own. He may

[14] In Colten's case the superior court judge did know about the $10 fine. Colten's counsel in closing argument stated what the penalty had been, App. 93, although clearly he need not have done so.

also plead guilty without a trial and promptly secure a *de novo* trial in a court of general criminal jurisdiction. He cannot, and will not, face the realistic threat of a prison sentence in the inferior court without having the help of counsel, whose advice will also be available in determining whether to seek a new trial, with the slate wiped clean, or to accept the penalty imposed by the inferior court. The State has no such options. Should it not prevail in the lower court, the case is terminated, whereas the defendant has the choice of beginning anew. In reality his choices are to accept the decision of the judge and the sentence imposed in the inferior court or to reject what in effect is no more than an offer in settlement of his case and seek the judgment of judge or jury in the superior court, with sentence to be determined by the full record made in that court. We cannot say that the Kentucky trial *de novo* system, as such, is unconstitutional or that it presents hazards warranting the restraints called for in *North Carolina* v. *Pearce*, particularly since such restraints might, to the detriment of both defendant and State, diminish the likelihood that inferior courts would impose lenient sentences whose effect would be to limit the discretion of a superior court judge or jury if the defendant is retried and found guilty.

Colten's alternative contention is that the Double Jeopardy Clause prohibits the imposition of an enhanced penalty upon reconviction. The *Pearce* Court rejected the same contention in the context of that case, 395 U. S., at 719–720. Colten urges that his claim is stronger because the Kentucky system forces a defendant to expose himself to jeopardy as a price for securing a trial that comports with the Constitution. That was, of course, the situation in *Pearce*, where reversal of the first conviction was for constitutional error. The contention also ignores that a defendant can bypass the inferior court simply by pleading guilty and erasing immediately

thereafter any consequence that would otherwise follow from tendering the plea.

The judgment of the Kentucky Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

This case arose in the aftermath of a visit of the President's wife to Lexington, Kentucky, where nothing untoward happened. After her plane had left, appellant and a group of his friends got into "some six to ten cars" and started down the access road leading from the airport to the main highway. The lead car was stopped by the police because of an expired license plate and at the officer's request, pulled onto the shoulder of the access road. Appellant who followed also pulled onto the shoulder as did the other cars in the group. So there were no cars belonging to appellant's group blocking traffic.

The people in the cars, however, walked around, some talking with the police and appellants talking mostly with the driver of the lead car. Appellant claimed that he only wanted to advise the man who was getting the citation of his rights, and to help arrange for the driver and passengers in the lead car to get to Lexington. The Court of Appeals of Kentucky, however, said that "Colten's real intent was simply to aggravate, harass, annoy and inconvenience the police, for no purpose other than the pleasure of aggravation, harassment, annoyance and inconvenience." 467 S. W. 2d 374, 376.

The statute under which petitioner was convicted read in relevant part as follows: [1]

"(1) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

"(f) Congregates with other persons in a public

[1] Ky. Rev. Stat. § 437.016 (Supp. 1968).

place and refuses to comply with a lawful order of the police to disperse . . . ."

The Court of Appeals sustained the statute as applied because the inconvenience [2] and annoyance to the police far outweighed appellant's speech which fell "far below the level of minimum social value." 467 S. W. 2d, at 377. That court, citing our obscenity cases, said if "the lack of redeeming social value is a basis upon which the right of freedom of speech may be required to yield to the protection of contemporary standards of morality . . . it would seem that the public's interest in being protected from inconvenience, annoyance or alarm should prevail over any claimed right to utter speech that has no social value." *Ibid.*

But the speech involved here was nonerotic, having no suggestion or flavor of the pornographic.

The speech here was quiet, not boisterous, and it was devoid of "fighting words."

Moreover, this was not a case where speech had moved into action, involving overt acts. There were no fisticuffs, no disorderly conduct in the normal meaning of the words.

The Court of Appeals said "Colten was not seeking to express a thought to any listener or to disseminate any idea." 467 S. W. 2d, at 378. Nor was he, it said, "exercising the right of peaceable assembly." *Ibid.*

He was, however, speaking to a representative of government, the police. And it is to government that one goes "for a redress of grievances," to use an almost forgotten phrase of the First Amendment. But it is said that the purpose was "to cause inconvenience and an-

[2] Neither appellant nor any in his group blocked traffic, their cars being parked on the shoulder of the road. Any blocking of traffic was caused by police who pulled up to see what was going on, leaving their patrol cars in the access road. See 467 S. W. 2d 374, 376.

noyance." Since when have we Americans been expected to bow submissively to authority and speak with awe and reverence to those who represent us? The constitutional theory is that we the people are the sovereigns, the state and federal officials only our agents. We who have the final word can speak softly or angrily. We can seek to challenge and annoy, as we need not stay docile and quiet. The situation might have indicated that Colten's techniques were ill-suited to the mission he was on, that diplomacy would have been more effective. But at the constitutional level speech need not be a sedative; it can be disruptive. As we said in *Terminiello* v. *Chicago*, 337 U. S. 1, 4:

> "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."

Under that test this conviction should be set aside.

MR. JUSTICE MARSHALL, dissenting.

In my view, *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), requires a reversal of this case.

In this case the Court correctly evaluates Kentucky's procedure: "[A] defendant convicted after a trial or plea in an inferior court may not seek ordinary appellate review of the inferior court's ruling. His recourse is the trial *de novo*." From this the conclusion is reached that the "trial *de novo*" is not an appeal. What, then, is it?

The pertinent Kentucky Rules provide:

12.02 *Manner of Taking*

"(1) An appeal to the circuit court is taken by filing with the clerk thereof a certified copy of the judgment and the amount of costs, and causing to be executed before the clerk a bond to the effect that the defendant will pay the costs of the appeal and perform the judgment which may be rendered against him on the appeal; whereupon, the clerk shall issue an order to the judge or the justice rendering the judgment, to stay proceedings thereon, and to transmit to the office of said clerk all the original papers in the prosecution.

"(2) The applicable provisions governing bail shall apply to the bond provided for in subsection (1).

"(3) After the service of the order to stay proceedings, no execution shall be issued from the inferior court, and any officer on whom the order is served shall return the execution in his hands as suspended by appeal."

12.06 *Schedule and Manner of Trial; Judgment*

"Appeals taken to the circuit court shall be docketed by the clerk thereof as a regular criminal prosecution and shall be tried anew, as if no judgment had been rendered, and the judgment shall be considered as affirmed to the extent of the punishment, if any, adjudged against the defendant in the circuit court, and thereupon he shall be adjudged to pay the costs of the appeal. If an appeal taken to the circuit court be dismissed, the judgment of the court from which it was taken shall stand affirmed and the costs of the appeal shall be paid by the party whose appeal is dismissed."

In *Pearce* this Court reaffirmed the restrictions upon heavier sentences after appeal:

> "It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. Where, as in each of the cases before us, the original conviction has been set aside because of a constitutional error, the imposition of such a punishment, 'penalizing those who choose to exercise' constitutional rights, 'would be patently unconstitutional.' *United States* v. *Jackson*, 390 U. S. 570, 581. And the very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to 'chill the exercise of basic constitutional rights.' *Id.*, at 582. See also *Griffin* v. *California*, 380 U. S. 609; cf. *Johnson* v. *Avery*, 393 U. S. 483. But even if the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law. 'A new sentence, with enhanced punishment, based upon such a reason, would be a flagrant violation of the rights of the defendant.' *Nichols* v. *United States*, 106 F. 672, 679. A court is 'without right to . . . put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered. . . . [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice.' *Worcester* v. *Commissioner*, 370 F. 2d 713, 718. See *Short* v. *United States*, 120 U. S.

App. D. C. 165, 167, 344 F. 2d 550, 552. 'This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin* v. *Illinois*, 351 U. S. 12; *Douglas* v. *California*, 372 U. S. 353; *Lane* v. *Brown*, 372 U. S. 477; *Draper* v. *Washington*, 372 U. S. 487.' *Rinaldi* v. *Yeager*, 384 U. S. 305, 310–311." 395 U. S., at 723–725.

This Court today seeks to escape this determination by such conclusions as:

"Our view of the Kentucky two-tier system of administering criminal justice, however, does not lead us to believe, and there is nothing in the record or presented in the briefs to show, that the hazard of being penalized for seeking a new trial, which underlay the holding of *Pearce*, also inheres in the *de novo* trial arrangement. Nor are we convinced that defendants convicted in Kentucky's inferior courts would be deterred from seeking a second trial out of fear of judicial vindictiveness. The possibility of vindictiveness, found to exist in *Pearce*, is not inherent in the Kentucky two-tier system."

To the contrary, appellant's Jurisdictional Statement cites us to an order of the same judge who tried this case *"de novo"* in which he accepted a motion to dismiss an appeal in a similar case with the following statement:

"The Commonwealth Attorney has advised the Court that he does not wish to oppose the defendant's motion to dismiss.

"While the defendant may be correct in his assumption that the citizens of this community have a hostile attitude toward students who would at-

> tempt to disrupt the university, it may be that this hostility has been earned, and it is conceivable that a jury composed of citizens of this community might impose a more severe sentence than that imposed in the court below. Nonetheless, the Court after having reviewed the law submitted by the defendant and having conducted its own research of the law is of the opinion that the defendant has a right to dismiss his appeal and that he cannot be forced into a new trial if he does not desire to continue his appeal. For that reason the defendant's motion to have his appeal dismissed be and the same is hereby granted."

The record in this case also shows that the trial judge was informed of the lower $10 fine in the original trial and consequently knowingly increased it to $50. Finally, it should not be forgotten that under this Court's ruling today he could have increased it to $500 plus six months in jail.

The Court suggests that for some reason there is less danger of vindictive sentencing on the second trial in this context than after an ordinary appeal. Specifically, the Court faults the appellant for failing to present evidence that the danger of vindictiveness is as great here as in the precise context presented in *Pearce*. But *Pearce* did not rest on evidence that most trial judges are hostile to defendants who obtain a new trial after appeal. *Pearce* was based, rather, on the recognition that whenever a defendant is tried twice for the same offense, there is inherent in the situation the danger of vindictive sentencing the second time around, and that this danger will deter some defendants from seeking a second trial. This danger, with its deterrent effect, is exactly the same even though the second trial takes place in a different court from the first. Certainly a defendant has good reason to fear that his case will

not be well received by a second court after he rejects a disposition as favorable as the sentence originally imposed in this case.

Pearce was directed toward a new trial after an appellate reversal. This case involves a new trial without an appellate reversal. The core problem is the second trial. In both cases we have a second full and complete trial. *Pearce* should control.